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IN THE

Supreme Court of the United States

MITCH MCCONNELL, UNITED STATES SENATOR, *et al.*,
Appellants/Cross-Appellees,
v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees/Cross-Appellants.

AND CONSOLIDATED CASES

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR INTERVENOR-DEFENDANTS SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, SENATOR OLYMPIA SNOWE, AND SENATOR JAMES JEFFORDS

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QUESTIONS PRESENTED

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is designed to protect the integrity of the federal election process, to guard against the corruption and appearance of corruption of federal officials and candidates for federal office, and to prevent a recurrence of the massive circumvention of longstanding regulations of campaign finance in the Federal Election Campaign Act (FECA) that occurred before enactment of BCRA.

In light of the fact that the Solicitor General will comprehensively address the various plaintiffs' constitutional objections to BCRA, the intervenor-defendants will address only the following questions in this brief:

1. Whether Title I of BCRA—which prohibits national political parties, federal officeholders, candidates for federal office, and officers of national political parties from soliciting and using "soft money" (donations from prohibited sources such as corporations and labor unions or in amounts exceeding statutory contribution limits), and which restricts state and local political parties, state candidates, and state officials from using unlimited "soft money" for "federal election activity"—is constitutional.

2. Whether Title II-A of BCRA—which prohibits the use of funds from corporate and labor union general treasuries for "electioneering communications," and which imposes disclosure requirements with respect to "electioneering communications"—is constitutional.

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INTRODUCTION

More than a century ago, Elihu Root decried massive donations to political parties and candidates as

> a constantly growing evil in our political affairs, which has . . . done more to shake the confidence of the plain people of small means in our political institutions[] than any other practice which has ever obtained since the foundation of our government. And I believe that the time has come when something ought to be done to put a check upon the giving of $50,000 or $100,000 by a great corporation toward political purposes, upon the understanding that a debt is created from a political party to it; a debt to be recognized and repaid with the votes of representatives in the legislature and in Congress, or by the actions of administrative or executive officers who have been elected in a measure through the use of the money so contributed.[1]

The concerns about the vitality of our democratic system that lie at the heart of this case are thus "neither novel nor unfamiliar." SA 479(K).[2] Congress and the States have long wrestled with the problem that "aggregated capital [can] unduly influence[] politics, an influence not stopping short of corruption." *FEC* v. *Beaumont*, 123 S. Ct. 2200, 2205 (2003). To protect democracy, they have limited the size of campaign contributions; mandated public disclosure of contributions and expenditures; and required corporations and unions to use only funds voluntarily raised from individuals to make campaign-related contributions and expen-

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[1] Elihu Root, Political Contributions By Corporations (Sept. 3, 1894), in *Addresses on Government and Citizenship* 143-44 (R. Bacon & J. Scott eds., 1916).

[2] Citations to "SA" refer to the district court's opinions reprinted in the supplemental appendix to the jurisdictional statements. We use the judges' initials (H, L, K) to refer to their individual opinions, and "PC" for the per curiam opinion. "DEV" refers to the defendants' exhibit volumes in the court below, and "IER" to the intervenors' excerpts of record.

ditures. This Court has sustained many such measures. *See id.*; *FEC* v. *Colorado Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Burroughs* v. *United States*, 290 U.S. 534 (1934).

In the 1970s, after the public learned that its government officials had granted favors, positions, and preferential access to campaign donors, Congress acted to restore integrity to a system that had suffered a dramatic loss of public confidence. Congress did not attempt to remove private money from politics. But it did seek to ensure that federal officials would not be induced to heed the wishes of $100,000 donors, donors would not feel compelled to make massive contributions as insurance against official retaliation, corporations and unions would not use their war chests to advance the election of federal candidates in the hope of gaining influence with them, and citizens would not lose faith in their representatives out of concern that they were more responsive to the large moneyed interests that had assisted their election than to their constituents—or the public interest.

Yet history teaches that political actors and those who control aggregations of wealth are always "test[ing] the limits of the current law," *Beaumont*, 123 S. Ct. at 2207, and a generation later, Congress recognized that its work was on the brink of collapse. Although the Federal Election Campaign Act (FECA) worked well for a time, its effectiveness was undermined when the Federal Election Commission (FEC) created significant loopholes, which players of the political money game relentlessly exploited. By the 2000 elections, political actors had ceased to observe anything like a prohibition against contributions or expenditures from corporations or unions, or against contributions in excess of statutory limits, for the purpose of influencing federal elections. The Bipartisan Campaign Reform Act (BCRA) is Congress's attempt to restore FECA to working order.

The plaintiffs' position is that FECA, having fallen (or, more accurately, having been pushed), must, like Humpty Dumpty, remain forever smashed. They argue that the

Constitution permits only rules that would be ineffectual to counteract either the reality or the perception of a system in which donors give massive assistance to political parties on the understanding that they create—as Elihu Root stated—"a debt to be recognized and repaid." In their view, Congress, this Court, and the public must accept a political system in which an overwhelming majority of Americans believe that Members of Congress disproportionately heed the views of large donors to political parties—even if those views do not coincide with what most constituents want, or what a Member thinks is best for the country. *See* SA 626-28(K), 1289-92(L); Mellman/Wirthlin Rep. 6-9 (JA 1564-69).

As this Court has observed, "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000). Nothing in BCRA casts the least doubt on "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). But BCRA serves public interests every bit as profound: "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." *United States* v. *UAW*, 352 U.S. 567, 570 (1957).

STATEMENT

1. *The Problem Congress Faced.* FECA carried forward provisions, first enacted between 1907 and 1947, prohibiting corporations and unions from using their general treasury funds to make contributions or expenditures in connection with federal election campaigns. FECA permitted corporations and unions to establish separate segregated funds (PACs), to solicit voluntary contributions to those PACs from related individuals, and to use the PAC funds in federal campaigns. It limited other campaign contributions

and expenditures, required expanded disclosure of both, and established the FEC to enforce the law.

In *Buckley* v. *Valeo*, this Court generally upheld FECA's limits on contributions to candidates and political committees, 424 U.S. at 23-38; struck down its limits on expenditures, *id.* at 39-51; and upheld its disclosure requirements, *id.* at 60-84. In sustaining disclosure of expenditures by persons other than candidates or political committees (such as political parties), the Court construed the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80. As examples, the Court pointed to words of "express ... advocacy" such as "vote for" or "vote against." *Id.* at 80 n.108 & 44 n.52.

a. *Soft Money.* Two years after *Buckley*, the FEC embraced a legal fiction under which political parties effectively became able to use funds raised directly from corporations and unions and from individuals in amounts exceeding FECA's contribution limits ("soft money") for activities affecting federal elections. Under this loophole, political parties could use a combination of "hard" (FECA-compliant) and soft money for mixed-purpose activities that influenced both federal and state elections. FEC Adv. Op. 1978-10. This fiction allowed political parties to raise and use unlimited soft money to influence federal elections.[3]

National-party soft money spending grew from $19 million in 1980 to $80 million in 1992, by which time a significant

[3] Plaintiffs object to the term "soft money." Congress, however, used that term to refer to funds that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. § 441i ("Soft money of political parties"). Members of this Court have used the term the same way. *Colorado Repub. Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.) (*Colorado I*); *Shrink Mo.*, 528 U.S. at 398 (Stevens, J., concurring). Plaintiffs prefer terms such as "state" or "state-regulated" money, but those locutions are premised on the very fiction that BCRA was enacted to address—that the hundreds of millions of dollars donated to parties' "non-federal" accounts were not used to influence federal elections. *See* pp. 17-19, 25-26.

share was being spent to influence federal elections. SA 32-35(PC); Mann Rep. 15-17 (JA 1548-51). The trend accelerated in the 1996 elections, when the national parties ran so-called "issue" ads prominently featuring presidential candidates, but funded in large part with soft money on the theory that they used no words "expressly advocating" any candidate's election. SA 35-37 & nn.14-15(PC), 494-95(K), 1191(L). By the 2000 election cycle, their soft money activity reached $498 million—42% of their total spending. SA 38(PC).

The FEC's rules permitted state parties to use a greater percentage of soft money than national parties in funding mixed-purpose activities. The parties gained leverage by raising soft money at the national level, but transferring it to state parties to fund activities—including "issue" ads—that influenced federal elections. SA 33-37(PC), 517-19(K), 1231-34(L). In 1996 the national parties transferred to state parties $115 million in soft money—two thirds of state-party soft money expenditures. By 2000, the amount rose to $280 million—more than half the soft money the national parties raised. SA 490-91(K), 1188-89(L).

To raise a half-billion dollars, the national parties turned to large donors. In the 2000 election cycle, 60% of their soft money came from just 800 donors—including 435 unions, corporations, and other organizations, and 365 individuals—each contributing at least $120,000. SA 287(H), 1189(L). These developments struck at the fundamental principle, sustained by this Court, that the threat of actual or apparent corruption can be minimized by regulating the source and amount of contributions made to influence federal elections.

b. *"Issue" Advocacy.* Like the parties, corporations, unions, and others began sponsoring advertisements that supported or opposed federal candidates but avoided words of "express advocacy." Following the lead of the AFL-CIO, corporations, unions, and interest groups spent millions of dollars in 1996 from their treasury funds and dues (not PAC funds) to pay for broadcast ads directed at specific federal candidates and aired in their districts in the final weeks before their elections. SA 38-40(PC), 678-99(K), 1316-17(L).

The record "unequivocally establishes" that despite the absence of "magic words," such ads "not only [were] crafted for the specific purpose of directly affecting federal elections, but [were] very successful in doing just that." SA 1161(L); *see* SA 810-21(K). Like soft money donations to parties, candidate-focused "issue" ads undermined core aspects of the campaign finance regime upheld in *Buckley*. They allowed corporations and unions to intervene in federal elections using general treasury funds rather than PAC funds, and enabled groups and individuals to make campaign expenditures without meeting FECA's disclosure requirements. SA 39(PC), 657-58(K), 1306-08(L).

2. *Congress's Response.* BCRA responds to these wholesale evasions in a direct but tailored way. The details of BCRA are covered elsewhere. We note, however, that plaintiffs' attacks on BCRA studiously ignore its core function of restoring public confidence in federal officials and elections by closing the soft money and "issue" ad loopholes. Instead, they imagine obscure applications of BCRA, and then suggest those applications lie at the heart of the law; they stretch to find the most draconian possible interpretation of the law, only then to complain of its harsh effect; and most significantly, they repeatedly mischaracterize the law's provisions, and thus attack something that does not exist.

For example, the political parties highlight their four most compelling examples of BCRA's supposed excesses on the first page of their brief. None is addressed to BCRA's core provisions, and each is premised on a misstatement of the law. First, the parties assert it is a crime under BCRA for "the Chairman of the RNC . . . to send a fundraising letter on behalf of his party's . . . gubernatorial candidate in [an] off-year election." But the FEC and Justice Department have made clear that national-party officials may solicit hard money on behalf of any candidate—federal, state, or local—and their parties also remain free to contribute

hard money to federal, state, and local candidates.[4] Second, they assert that California state parties may not donate even hard money to PACs formed to support or oppose the current effort to recall the Governor. In fact, the relevant restriction has no application to the recall election, which the State of California has scheduled for October 7, 2003, five months away from any federal election.[5] Third, they assert that BCRA subjects to "pervasive federal regulation voter registration and get-out-the-vote . . . efforts by state and local parties." Actually, BCRA does not regulate—much less "pervasive[ly]" regulate—these activities, but merely addresses the size and source of contributions used to finance them, when they are conducted in connection with federal elections.[6] Most bewilderingly, plaintiffs assert that BCRA makes it a crime for the national parties to work with their state counterparts "to design, fund, and implement statewide voter mobilization programs." In truth, BCRA does not prevent national and state parties from coordinating their activities for such efforts, so long as the national parties do not *solicit* soft money or *control* its expenditure.[7]

Plaintiffs' characterizations of BCRA's new definition of "electioneering communications" are equally flawed. They persistently contend (*e.g.*, McConnell Br. 39) that the electioneering communications provisions "seek to prohibit core political speech." These provisions ban no speech. Corporations and unions remain free to run federal campaign ads, as

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[4] 2 U.S.C. § 441i(a)(1), (2) (national parties and their officers prohibited from soliciting funds that are not "subject to the limitations, prohibitions, and reporting requirements of this Act"); *see* pp. 36-37.

[5] 11 C.F.R. 300.37(a)(3)(iv) (state parties may transfer funds to state political committees supporting only state or local candidates and not engaging in federal election activity); *see* p. 38 n.29.

[6] 2 U.S.C. § 441i(b)(1) (amounts expended for federal election activity "shall be made subject to the limitations, prohibitions, and reporting requirements of this Act"); *see* pp. 27-28.

[7] 2 U.S.C. § 441i(a)(1) (national party may not "solicit, receive, or direct to another person . . . or spend" soft money).

long as they pay for the ads from PAC funds voluntarily contributed by individuals for that purpose.

Most fundamentally, plaintiffs mischaracterize BCRA as representing an epochal change in the law. In truth, BCRA merely strives to restore the efficacy of longstanding federal campaign finance laws, and to put an end to the evasion that has made a mockery of the law and left the public to believe that democracy is for sale.

SUMMARY OF ARGUMENT

BCRA's aim is to restore public faith in federal officeholders and elections by closing the soft money and "issue" ad loopholes that had, in recent years, eviscerated the federal campaign finance laws. Prior to enactment of BCRA, corporations, unions, individuals, and political parties routinely evaded long-established contribution limits and source restrictions. Hundreds of millions of dollars of contributions were used to influence federal elections without complying with federal standards. Similarly, by running campaign ads that avoided words of "express advocacy," corporations and unions routinely evaded federal restrictions on the use of their general treasury funds to influence federal elections, injecting many millions of dollars more of unregulated money into federal elections. BCRA responded to the collapse of the FECA regime in a considered and measured way. The law should be sustained in its entirety.

I. Title I restores efficacy to the FECA structure of source prohibitions, amount limits, and disclosure requirements for contributions used to influence federal elections. It does so by banning soft money contributions to national political parties, regardless of how the money is used, and restricting state parties' use of soft money for specified "federal election activity." It imposes no spending limits on anyone, but rather addresses the risk that large political contributions will foster actual or apparent corruption of federal officeholders. Upholding Title I thus requires no more than reaffirming the principle of *Buckley* v. *Valeo* that Congress may limit contributions in a real and effective manner.

The Members of Congress who enacted BCRA correctly concluded, based on a substantial record and their own experiences, that the corrupting potential of soft money donated to national parties stems from the way in which it is raised, and from the close relationship between national parties and federal officeholders and candidates. Rather than insulating their officeholders from this corrupting potential, national parties acted as the conduit for that corruption, bringing soft money donors and officeholders together and urging officeholders to raise soft money and to entertain the policy wishes of the donors. Congress recognized that this system generated enormous damage to public confidence in our democratic system and public officials, and enabled candidates to engage in massive circumvention of FECA's limits on sources and amounts of contributions.

Congress knew that national parties had used state affiliates to deploy soft money for activities affecting federal elections. It understood that any effective reform measure had to address state-party use of soft money in federal elections, lest the problem immediately regenerate at the state party level. Congress delineated four categories of activities undertaken by state parties with the largest impacts on federal elections and determined they should be paid for with FECA-compliant money. Congress may protect the integrity of federal elections and officeholders in this manner, particularly since BCRA leaves state parties otherwise free to spend whatever money they may raise under state law. The balance of Title I guards against corruption and avoidance of the soft money restrictions by other well-tried devices known to Congress.

II. Title II addresses the problem of candidate-focused "issue" ads. It bans no speech. It only restricts the source of the funds used for those ads and requires disclosure in certain circumstances.

Before BCRA, unions, corporations, and others routinely created ads to support or oppose specific candidates, while avoiding "magic words" of "express advocacy." They hired campaign consultants and pollsters to refine electioneering messages in these ads, and made clear in their own

statements what they were doing. These ads shared characteristics with parties' and candidates' ads that confirm their electioneering nature: they named specific candidates; they were concentrated in the last weeks before an election; and they were targeted to close races in a partisan way. The sponsors of these ads fundamentally undermined FECA's source and disclosure rules for independent campaign expenditures—in reality, they conducted electioneering with unlimited corporate and union treasury funds, and without disclosing the sources of the funds. Their techniques also created opportunities for corruption in the exchange of "issue" ad campaign support for political favors.

Title II responds narrowly and objectively to these problems by defining a new category of "electioneering communications" with specific reference to the demonstrated dimensions of the problem. Imposing source and disclosure rules on such ads serves the same compelling interests that sustain those rules as applied to "express advocacy": preventing the distortions that arise when corporate and union treasuries become political "war chests"; providing information to the voting public; and preventing circumvention of other rules. Title II also serves the compelling First Amendment interest in using clear, objective statutory lines in this sensitive area. And it imposes only modest burdens—disclosure rules, and the requirement that corporations and unions fund some ads during the immediate preelection period with PAC funds.

Buckley did not codify "express advocacy" as a constitutional test; it held only that a statutory line defining independent campaign spending should be clear, and directed at advocacy relating to the campaigns of particular federal candidates. Title II satisfies those precepts. Nor is Title II overbroad. It imposes only limited burdens of a sort this Court has already recognized may, in appropriate circumstances, be imposed even on political speech entitled to stringent protection under the First Amendment. That Title II applies only to limited categories of speech during the period just before elections is a virtue, not a tailoring flaw. Plaintiffs' attack on a small portion of the empirical evidence

supporting Title II is misguided and irrelevant, and their examples of past ads supposedly demonstrating overbreadth offer them little support. Additional arguments raised by ideological nonprofit organizations do not support either the facial invalidation of any part of Title II or a blanket exemption.[8]

ARGUMENT

I. TITLE I OF BCRA IS CONSTITUTIONAL

A. Soft Money Has Undermined Democratic Institutions And Public Confidence In Government

Since the Tillman Act of 1907, which prohibited corporate campaign contributions, Congress has endeavored to prevent the corruption and appearance of corruption of federal elected officials by reducing their dependence on large campaign contributions. Congress's concerns, as relevant now as they were in the time of Theodore Roosevelt, are that public officials will be particularly attentive to the interests of those who make large contributions to candidates and their political parties, and that citizens will perceive such official responsiveness to large donors as characteristic of a degraded system that does not deserve public confidence. Whether or not officeholders in fact yield to the temptation to assist large donors, "the opportunity for abuse inherent in the process of raising large monetary contributions" is plain. *Buckley*, 424 U.S. at 30.

The 1990s made clear that the temptation facing politicians to assist large donors is not limited to helping those who have contributed directly to their own campaigns. The political fortunes of officeholders and candidates are intertwined with the fortunes of their parties. Green Rep. 7-10 (JA 1195-1200). The Members of Congress who enacted BCRA learned through personal experience that office-

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[8] The NRLC plaintiffs argue (Br. 45-49) that intervenor-defendants lack Article III standing to defend the constitutionality of BCRA. The Court should reject that contention for the reasons set forth in the district court's order of May 3, 2002. NRLC Reply Br. App. 4a-6a.

holders also have a powerful incentive to assist those who have contributed generously to their closest allies—their national and state political parties.

1. The Soft Money System In Operation

The political parties argue that Title I responds to a phantom—that the spectacle of 93 entities contributing $100,000 or more in soft money to *both* major national political parties in the 2000 election cycle alone does not even raise an appearance of corruption.[9] Although this Court has recognized that little evidence is required to support the self-evident proposition that "large contributions" pose a threat of actual or apparent corruption, *see Shrink Mo.*, 528 U.S. at 391, the record overwhelmingly establishes the reasonableness of Congress's conclusion that soft money had fundamentally undermined public confidence in our democratic system and elected officials. That evidence includes testimony from current and former Members of Congress, current and former party officials, and experts, as well as many thousands of pages of documents, press reports, and studies chronicling how those exploiting the soft money loophole made a mockery of federal campaign finance laws and their goal of minimizing actual or apparent corruption of federal officeholders.

There was no mystery in the way the soft money system worked. As Members of Congress who voted to end that system knew from personal experience, political parties routinely offered donors more extensive and more personal access to federal officeholders in exchange for larger donations. Often the parties explicitly offered donors opportunities to exchange views with officeholders on matters of policy in return for large contributions. On other occasions, the parties offered donors the opportunity to introduce themselves to officeholders for later follow-up. The most notorious examples may be the "White House coffees" with President Clinton that the DNC facilitated for particularly generous contributors, but instances of such preferential access were numerous, if generally occurring in more prosaic settings. S. Rep. No. 105-167, at 191-224 (1998) (Thompson Comm. Rep.); SA 603-15(K), 1268-76(L).

[9] Common Cause, *You Get What You Pay For* (2000) (analysis of FEC reports showing 93 donors gave $100,000 or more to both Democrats and Republicans between January 1, 1999 and June 30, 2000), DEV 31, Tab 52.

Party officials commonly offered to pass on the concerns of generous donors to appropriate persons on Capitol Hill, and asked Members to meet with donors to hear their proposals on pending issues. In that way, party officials directly linked donors' generosity to Members' willingness to entertain their positions. SA 603-07(K), 1269-71(L). And as former Senator Warren Rudman recounted (Rudman Dec. ¶ 7 (JA 742)), the ensuing conversations between Members and donors were "not idle chit-chats about the philosophy of democracy":

> Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it—it is perfectly understood by all participants in every such meeting.

Plaintiffs argue that there is no proof of a direct connection between large donations and floor votes on specific legislation. That can hardly be the test for actual corruption, and in any event, the evidence is to the contrary. Senator Feingold testified, for example, that a fellow Democrat (and member of the Senate leadership) urged him to end a filibuster of a pending bill because it contained a provision sought by Federal Express, which had made a $100,000 soft money contribution to their party. Feingold Dep. 62. Former Senator Paul Simon similarly recounted that members of his party caucus knew who was "buttering our bread" and acted accordingly. Simon Dec. ¶¶ 13-18 (JA 805-07). The legislative record, as well as testimony in this case by Members of Congress, connected soft money to Congress's failure to enact generic drug legislation, tort reform, tobacco-control measures, and new accounting rules for stock options. Fein-

gold Dep. 62; McCain Dec. ¶¶ 8-11 (JA 392-94); Meehan Dep. 11-14; Shays Dep. 63-65, 228.

As former Senator Alan Simpson explained (Simpson Dec. ¶ 10 (JA 811)):

> Too often, Members' first thought is not what is right or what they will believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from trial lawyers to Democrats stopped tort reform.

There are also many ways other than floor votes, less open to public scrutiny, in which Members influence the legislative process—especially through control of the legislative calendar—and soft money often had its effect long before the votes were cast. McCain Dec. ¶ 5 (JA 390-91); Simon Dec. ¶¶ 13-14 (JA 805). Experts confirmed that, even if only a small proportion of actual votes are directly influenced, contributions may have "a significant impact on legislative outcomes." Green Rep. 24-25 (JA 1218-20); *see* Bok Rep. 3-5.

Donors understood that soft money was "essential for developing relationships with Members of Congress, which in turn lead[s] to access, which in turn lead[s] to influence over policy." SA 589(K); *see* SA 1265, 1277-81(L). A prominent lobbyist explained that, under the soft money system, traditional lobbying activities are "alone insufficient to be effective .... To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important." Andrews Dec. ¶ 5 (JA 2); SA 589-95(K).

Donors therefore viewed soft money contributions as a necessary investment toward favorable policy outcomes. As observed in one representative internal document from a Fortune 100 company, soft money donations were a "key to [the company's] increased role and ability to get [its] views heard by the right policy makers on a timely basis; in other words, a smart investment." SA 599(K), 1280(L). An executive of another large company explained the need to contribute $1.4 million by noting that both parties believed soft money was "critical to their success in coming elections" and were "especially sensitive to which companies contribute soft money, and which don't." SA 618(K); *see* 1284(L). Many other documents in the record are to the same effect; corporate employees justified soft money donations because they would "strengthen our relationship" with a Member, "get our relationship" with a Member "off to a good start," or "establish[] goodwill." SA 587-88(K); *see* SA 1280-81(L).

The most striking evidence on this point is that many corporations made massive soft money donations to *both* major political parties. *See* Mann Rep. tbls. 5-6 (App. 52a-55a). Donors who felt "increased pressure from party and congressional leaders" and who knew that "direct competitors and potential competitors are weighing in with big soft money donations" wanted to ensure that they had access to "both sides of the aisle." SA 618(K), 1284-85(L). Indeed, the soft money system evolved to the point that donors feared retaliation unless they made contributions to both parties. Greenwald Dec. ¶ 9 (JA 282-83); Hassenfeld Dec. ¶ 23; SA 584, 599(K). The parties promoted this fear; when they learned a donor had given to the other side, they would "get a message" to the donor asking, "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" SA 619-23(K), 1284-86(L); Randlett Dec. ¶ 12 (JA 715). As former Senator Dale Bumpers stated, massive donations turned into a coercive kind of "insurance." Bumpers Dec. ¶ 14 (JA 174-75).

Soft money also gave rise to a widespread perception of corruption. A study conducted by two leading experts in public opinion (one Democrat, one Republican) found that 71% of the public believed Members of Congress sometimes voted the way large donors to their parties wanted, even when that was not what people in their districts wanted or what Members thought best for the country. Similarly, 84% believed that Members of Congress would be more likely to listen to those who gave money to their political party in response to their solicitations for large donations, and 68% be-

lieved that big donors sometimes blocked official decisions that could have improved the everyday lives of the public. Mellman/Wirthlin Rep. 7-9 (JA 1566-69). A 2000 survey of leading corporate executives likewise found that 74% believed businesses were pressured to make large political donations; half stated that businesses feared adverse legislative consequences if they turned down requests from high-ranking party officials and their surrogates; and 75% believed their donations gave them an advantage in shaping legislation. When asked why corporate America contributed to political campaigns, the surveyed executives' most frequent answer was "to avoid adverse legislative consequences" (31%), followed by "to buy access to influence the legislative process" (23%). Kolb Dec. ¶ 9 & Ex. 6 (JA 349); SA 574(K).

But the testimony of the true experts about public opinion—Members of Congress—is the most remarkable. Both in the legislative debates on BCRA and in sworn testimony in this case, Members reported that their constituents had become "as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." Simpson Dec. ¶ 14 (JA 812); *see* SA 630-33(K), 1278, 1294-95(L) (quoting numerous Members of Congress). Members themselves described the soft money system as corrupting. Senators Boren, Brock, Bumpers, Feingold, Jeffords, McCain, Rudman, Simon, Simpson, Snowe and Wirth, and Representatives Meehan and Shays, among others, detailed the baneful effects of soft money on the working of our government.[10] Former Senator Rudman described large soft money contributions as "inherently, endemically, and hopelessly corrupting," and stated, "You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty." Rudman Dec. ¶ 10 (JA 743). Given that senior elected officials perceived the

[10] *See also* DEV 32, Tab 70 (chart of statements in the Congressional Record by Sen. Feingold identifying ways in which soft money donors had apparently secured influence over legislation).

political system in which they operated as "dirty," it is scarcely surprising that the public overwhelmingly agreed, or that Congress saw that BCRA was needed to restore public confidence.

2. Circumvention Of FECA And The Use Of Soft Money To Influence Federal Elections

Not only does the judicial and legislative record amply demonstrate that the raising of soft money—regardless of how that money was ultimately used—gave rise to both actual and apparent corruption, it also shows how the soft money system eviscerated FECA's core restrictions on the size and source of contributions to influence federal elections. This Court has long recognized the danger of circumvention of contribution restrictions, noting only a few months ago that "experience demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *Beaumont*, 123 S. Ct. at 2207. In light of that experience, the Court has consistently given effect to Congress's judgment that these limits must be reinforced by related restrictions. *See Buckley*, 424 U.S. at 38; *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 197-99 (1981) (plurality) (*CalMed*); *id.* at 203 (Blackmun, J., concurring in part and in the judgment).

The Court and Congress have found a particularly serious danger of circumvention in the prospect that a donor might effectively "contribute massive amounts of money to a particular candidate through . . . huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38. The soft money system was exactly that form of circumvention. Although the parties and many donors were aware that outright earmarking of donations for the benefit of particular candidates would run afoul of FECA, they engaged in every activity short of express direction to ensure that federal candidates could receive the benefit of soft money. There was scarcely any pretense that soft money would not be used to assist in electing the parties' federal candidates, in-

cluding in many cases the candidates who actually solicited the funds.

Indeed, soft money was largely *not* used for so-called "party building" functions, but rather was directed to activities related to the election of the parties' candidates. SA 495-501(K), 1198-1212(L). Lawmakers commonly asked donors who had reached their federal contribution limits to make soft money donations to national and state parties "solely in order to assist federal campaigns," including their own.[11] Parties kept close track of soft money raised by lawmakers, and "the amount of money a Member of Congress raise[d] for the national political party committees often affect[ed] the amount the committees g[a]ve to assist the Member's campaign." SA 555(K). Donors often requested that their soft money contributions be credited to particular candidates, and the parties obliged. It was of little significance to the donor whether funds were "hard" or "soft," as long as it was understood that the funds were to benefit particular parties and candidates. SA 558-61(K), 1198-1202, 1245-46(L); *see* SA 561-62(K), 1246-47(L) ("joint fundraising committees" established by parties and candidates). Just as the Court noted in *Colorado II* regarding hard money, so too with soft money: "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." 533 U.S. at 458.

The importance of soft money in influencing federal elections was confirmed by current and former party officials and the RNC's own soft money expert. Former RNC Chair Brock acknowledged that "the parties by and large use [soft] money to help elect federal candidates." Brock Dec. ¶ 6 (JA 170). The RNC's soft money expert has similarly explained that "[n]ational parties allocate soft money to state organizations primarily with the intent to help federal

[11] Randlett Dec. ¶ 9 (JA 714); *see* SA 550-53, 565-66, 1237-38(L) (Members asked donors to contribute to state parties "to help that officeholder or other federal candidates").

candidates in close races," and that soft money "permits candidates, contributors, and parties to circumvent federal laws limiting campaign contributions."[12] In short, as congressional investigative reports on abuses in the 1996 federal elections found, "permitting [soft money] donations to political parties eviscerated FECA's longstanding ability to prevent corporate and labor union treasury funds from influencing federal elections." SA 37(PC).

B. The Soft Money Restrictions Properly Respond To The Dangers Of Unlimited Contributions

1. The Court Should Defer To Congress's Judgments Underlying Soft Money Restrictions

Title I reflects Congress's determination that FECA's regulatory structure had been undermined to the point of collapse by the parties' burrowing at its vulnerable points. Members of Congress understood from personal and institutional experience how the soft money system functioned and what was needed to save FECA. This experience is particularly relevant in three respects, for "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Mo.*, 528 U.S. at 402 (Breyer, J., concurring).

First, Congress's experience establishes a strong basis for its judgment that officeholders and candidates understand that their political fortunes are intimately connected to their political parties. Members of Congress knew that, as federal officeholders, they cannot be expected to ignore their party's need for money or the expressed wishes of their party, including the wish that Members heed the concerns of large donors. Plaintiffs propose a theoretical construct in which parties shield their officeholders from the corrupting potential of large donations to the party. The

[12] La Raja Cross, Ex. 3 at 74; La Raja, *Sources and Uses of Soft Money*, in *A User's Guide to Campaign Reform* 83, 105 (G. Lubenow ed., 2001); SA 519-20(K), 1206, 1234, 1237(L).

Members who enacted BCRA knew otherwise. At the same time, given the close bonds between Members and their parties, it cannot be seriously maintained that Congress enacted BCRA to destroy the party system.

Second, Members knew from personal experience that donations for certain campaign activities, although purportedly not used to influence federal elections, were intended to and did in fact do so. The indisputable record was that, through the 1990s, parties had used soft money for generic campaign advertising, voter registration drives, get-out-the-vote (GOTV) activity, and "issue" ads mentioning federal candidates, with the intent to affect federal elections.[13] Although the FEC treated these donations as though they were not used to influence federal elections, Congress saw through this loophole and closed it.

Third, Title I includes anti-circumvention provisions that rest on Congress's judgment about how political actors will inevitably test the limits of the law—a judgment informed by an extensive factual record demonstrating how they had behaved in the past. In the First Amendment context, as elsewhere, this Court has deferred to Congress's predictive judgment about the need for regulation. *See Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 195-96 (1997). The case for deference is yet stronger here, where the law reflects how Members of Congress expect *they* (and their parties) would act in the future.

2. Only Limited Judicial Scrutiny Is Applicable To The Soft Money Provisions Of Title I

It is "settled" that regulations designed to buttress contribution restrictions need only be "closely drawn" to match the "sufficiently important" government interests in combating corruption and the appearance of corruption. *Colorado II*, 533 U.S. at 456. Plaintiffs nonetheless contend that Title

[13] *E.g.* Fowler Dec. ¶ 17 (JA 264); 148 Cong. Rec. H409 (Feb. 13, 2002) (Rep. Shays); SA 525-26(K).

I is a restraint on speech and association that requires strict scrutiny. This assertion is meritless.

After *Buckley*, it cannot be seriously contended that Title I's reinforcement of the FECA structure abridges any *contributor's* right of free speech. *Buckley* establishes that reasonable contribution restrictions work no impermissible restriction on the donor's right to speak, for "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 21. Nor does Title I restrain anyone from engaging in "direct political expression" on his or her own rather than (or in addition to) through parties and candidates. *Id.* at 22.

Title I also does not burden a *political party's* free speech rights in any constitutionally problematic way. Although plaintiffs devote much effort to arguing that Title I acts as a limit on campaign spending, it in fact leaves political parties free to spend as much money as they wish on federal or state election activity, be it for advertising, GOTV activity, or voter registration drives.[14] Title I regulates only the sources and amounts of funds that the parties may raise and use for federal election activities. Like the contribution limits in FECA to which they are tied, the soft money restrictions merely require parties "to raise funds from a greater number of persons," and do not "reduce the total amount of money potentially available to promote political expression." *See Buckley*, 424 U.S. at 22; *id.* at 29 (FECA contribution limits "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues").

That some of BCRA's provisions are necessarily framed in terms of mirror-image restrictions on "solicitations" rather than "contributions" does not occasion strict scrutiny. These solicitation provisions merely ensure that the contri-

[14] BCRA separately limits coordinated expenditures by national parties on behalf of their nominees to federal office, if they also make independent expenditures for the same nominees during the general election. 2 U.S.C. § 441a(d). That provision is discussed by the Solicitor General.

bution restrictions are not readily evaded, as they were in the past, and thus operate functionally as a reinforcement of the contribution limits. *Cf. Colorado II*, 533 U.S. at 438 (noting that FECA employs a "functional," not formal, understanding of contributions). The Court has previously sustained a provision of FECA that limits corporations and unions to soliciting contributions for their segregated PAC funds from certain persons, without suggesting that the statute's focus on solicitations was important (and indeed FECA does not separately prohibit contributions from other individuals). *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 206-11 (1982) (*NRWC*). Nor did the Court apply strict scrutiny to that solicitation restriction in *NRWC*. *See Beaumont*, 123 S. Ct. at 2211 (discussing *NRWC* on this point). Rather, the Court upheld the solicitation restriction as a legitimate "prophylactic measure[]." *NRWC*, 459 U.S. at 210.[15]

Nor does BCRA impermissibly burden any right of association. BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fundraising goals with one another. The parties invoke a

[15] Plaintiffs invoke *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290 (1981), in support of strict scrutiny, but nowhere in that decision did the Court state that it was applying strict scrutiny. *See id.* at 299 (challenged contribution limit "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights"); *id.* at 301 (Marshall, J., concurring) ("the Court is following our consistent position that this type of governmental action is subjected to less rigorous scrutiny than a direct restriction on expenditures"); *id.* at 302 (Blackmun & O'Connor, JJ., concurring in the judgment) (appropriate level of scrutiny requires only "a sufficiently important governmental interest" and "means 'closely drawn to avoid unnecessary abridgment' of First Amendment freedoms"; quoting *Buckley*). Moreover, that case involved a restriction on donations to groups promoting ballot measures, which the Court distinguished from *Buckley* on the ground that ballot measure groups had no nexus to corruption or appearance of corruption of officeholders or candidates. 454 U.S. at 296-97. The record in *this* case demonstrates that political parties have a close connection to officeholders and candidates, which enables them to serve as highly efficient conduits of corruption.

purported unlimited right to pass funds among one another, but no decision of this Court suggests this right has the elevated constitutional status that plaintiffs claim. *See Beaumont*, 123 S. Ct. at 2210 (restrictions on contributions subject to "relatively complaisant review"). In any event, nothing in BCRA prevents national and state parties from transferring unlimited amounts of hard money among one another. *See* 2 U.S.C. § 441a(a)(4).

Title I also does not abridge any party's right to associate with its donors. Contributions to candidates and political committees "lie closer to the edges than to the core of political expression." *Beaumont*, 123 S. Ct. at 2210. Any associational right of political parties to solicit donations is surely no more weighty than the right of would-be contributors to make them. Indeed, unlike donors, who make a "symbolic expression of support" to a party by making a contribution, *Buckley*, 424 U.S. at 21, a political party generally does not signal support for, or even a desire to be associated with, its donors when it solicits funds—especially when the donors give to *both* parties (as was often true with soft money).

3. The National-Party Soft Money Ban

BCRA provides that a national committee of a political party may not solicit, receive, direct to another person, or spend funds that are not subject to the source prohibitions and amount restrictions of FECA. 2 U.S.C. § 441i(a)(1). This across-the-board prohibition against the national parties' use of soft money is based on the judgment of Members of Congress, drawn from personal experience, that national political parties had acted as conduits of influence between party donors and the federal candidates and officeholders with whom the parties were connected, and that in consequence national parties had to be removed from the soft money business altogether. That judgment is amply supported by the legislative and judicial record.

a. Contrary to plaintiffs' contention, under the soft money system, political parties did not insulate their officeholders from importuning contributors or sanitize the effect of large contributions. Quite the reverse: the parties fre-

quently encouraged their officeholders to be attentive to their soft money donors' positions on matters of policy, and brought their donors and officeholders together to meet privately. SA 603-15(K), 1269-76(L). Federal officeholders and candidates were routinely informed of the identities of large donors to their parties. In many cases, Members of Congress personally solicited large soft money donations; in other cases, the parties distributed lists of potential and actual donors to officeholders. SA 579-82(K), 1258-61(L). Donors also often informed officeholders that they had made contributions to their party. "[F]or a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves." SA 581(K); *see* SA 1258(L).

Indeed, in the soft money context, it is futile to look for any meaningful separation between federal officeholders and their national parties. *All* the members of four of the six major national-party committees (DCCC, DSCC, NRCC, and NRSC) are federal officeholders. The DSCC and NRSC also established "joint fundraising committees" with the official campaigns of federal candidates, effectively enabling candidates to raise both hard and soft money simultaneously, in their own names and for their own races. SA 561-62(K), 1246-47(L); Krasno/Sorauf Rep. 13 (JA 1286).

The other major national committees—the DNC and RNC—are also tightly connected to their parties' federal officeholders. As former RNC Chair Haley Barbour stated, during presidential election years they make election of the President their "highest priority." SA 1197(L); *see* SA 545(K) (national committees assume "subsidiary role" to presidential candidate's campaign committee). The DNC's "issue" ad campaign on behalf of President Clinton in 1996 forcefully bears that out, but that episode is merely illustrative of the point that the central function of the major national-party committees is to promote the election of the parties' federal candidates. Any elected official also benefits considerably from a donor's generosity to his or her party, for an official's power depends greatly on whether that party

is in the majority or minority, and whether it controls another branch of the government or legislative chamber. Parties and their federal officeholders and candidates are thus connected by powerful bonds, and Congress recognized that elected officials are likely to be attentive to the concerns of generous donors to their parties.

b. Although Judge Leon accepted the basic premise of Title I—that *raising* unlimited soft money from corporations, unions, and wealthy individuals creates the potential for corruption and appearance of corruption, SA 1132-35—he mistakenly concluded that the validity of the national soft money ban turns on how the soft money is *spent*. Judge Leon believed that the interests of preventing corruption and appearance of corruption do not sustain BCRA in the absence of "any perceived, or actual, benefit to a federal candidate." SA 1103. He therefore concluded that, while Congress could prohibit national parties from using soft money to finance "public communications" that promote or attack clearly identified federal candidates, it could not ban the use of soft money for activities that do not "directly" affect federal elections, including disbursements for voter registration and GOTV activities undertaken within days of a federal election. SA 1119.

Even on its own terms, Judge Leon's theoretical demarcation between activities that do and do not provide a "perceived" or "actual" benefit to federal candidates does not support the line he drew. Congress reasonably determined that many activities undertaken by both national and state parties with soft money beyond "public communications"—including *all* the activities that Congress defined as "[f]ederal election activity," such as generic campaign activity and GOTV (even when it makes no express reference to a federal candidate)—actually benefit candidates in federal elections. Indeed, contrary to the picture drawn by the plaintiffs, soft money was generally not used for "party building" activity several steps removed from election cam-

paigns, but was used in just these ways to affect federal elections. Green Rep. 14 n.17 (JA 1205).[16]

But Judge Leon's approach is also misguided in a more fundamental respect: it fails to apprehend that, for national parties, the potential for corruption comes from *raising* soft money and the close connections between the party and its federal officeholders and candidates, regardless of how the national party spends that money. Title I does not rest on any notion that voter registration or GOTV activity is suspect; national parties may continue to spend unlimited hard money on such activities, or may transfer unlimited hard money to state and local parties if they prefer. Rather, Title I is predicated on Congress's well-supported recognition that, absent regulation to the contrary, corporations, unions, and individuals who want to obtain favors from federal officials will make large donations to be used by those officials and their parties as they perceive to be most advantageous to their political fortunes. And because of the close bonds between federal officeholders and their parties, unlimited donations threaten to corrupt federal officeholders even when they are made, not to assist the officeholders directly, but to help their political allies in the party. "[W]hether they like it or not, [parties] act as agents for spending on be-

[16] Representatives of all four major congressional campaign committees acknowledged, for example, that their committees targeted GOTV efforts paid for with soft money in states where there were close federal races, and that those efforts did affect federal elections. SA 525(K). The parties also told donors that their soft money would be used for GOTV efforts to help the parties' candidates in federal elections. SA 526(K). Similarly, the parties used soft money to conduct voter registration efforts that assisted federal as well as state and local candidates. SA 529-30(K). Expert testimony confirmed that, when a political party conducts GOTV and voter registration efforts, as well as generic advertising, the effect on the federal election is not "indirect," even when those activities do not expressly mention the federal candidate. In that situation, the parties expect and intend that efforts to mobilize voters "will produce a harvest of votes for [that party's] candidates for both state and federal offices." Green Rep. 14 (JA 1205-06); SA 527-29(K).

half of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452.[17]

c. Plaintiffs suggest there is no danger of corruption or appearance of corruption if national parties raise soft money only for the purpose of spending those funds on state races (or transferring those funds to state parties for use in state races). This argument suffers from the same flaw as Judge Leon's analysis: it fails to apprehend that the risk of corruption stems from the *raising* of the money. Moreover, in the past, the FEC allowed national parties to raise and use soft money purportedly for non-federal activity, but in fact that soft money was routinely used for activities affecting federal elections. Congress is not required to repeat that mistake.

Nor does the Constitution require Congress to permit an earmarking regime under which national parties could accept unlimited donations for some purposes, but not others. Just as Congress may bar a group that receives only a small part of its funds from corporations from making any campaign contributions, and need not consider whether any of the group's funding is earmarked for campaign purposes, *Beaumont*, 123 S. Ct. 2210 & n.7, Congress acted within its discretion in concluding that the only effective means to prevent the national parties from continuing to circumvent the law is an across-the-board rule against soft money. Indeed, given the fungibilty of money, if national parties could accept unlimited contributions purportedly for state purposes alone, donors could easily evade FECA's restrictions by making large soft money contributions to national parties simply to free up hard money for the party to use for federal

[17] Plaintiffs have stressed that Justice Breyer's lead opinion in *Colorado I* stated that "[w]e are not aware of any special dangers of corruption associated with political parties." 518 U.S. at 616. The issue here, however, is not whether political parties *themselves* commonly seek to corrupt their own candidates and officeholders with *lawfully* raised money, as had been argued in *Colorado I*. Rather, the point in this case is that political parties can serve as effective instruments of corruption by *others*—a point the Court strongly endorsed in *Colorado II*, 533 U.S. at 452.

candidates, who could then owe a debt of gratitude to the soft money donors.

In any event, the supposed impairment of the national parties' ability to assist their state affiliates is minimal. Even though national parties may not themselves spend soft money on state elections, they may spend unlimited hard money on state races, and may consult with state parties about how the state party might spend its own soft money on purely state races (as long as the national party does not control the use of the soft money, 441i(a)(1)). Thus, although plaintiffs characterize BCRA as driving a wedge between national and state parties, that is simply not the case.

4. The State-Party Soft Money Restrictions

a. Whereas BCRA precludes national parties from raising and spending soft money at all, Title I restricts state parties from using soft money only for specific "[f]ederal election activity." 2 U.S.C. § 441i(b)(1).[18] This restriction reflects Congress's determination—amply supported by the legislative and judicial record—that state parties had been pervasively used as conduits for soft money in federal elections.[19] Even leading opponents of campaign finance reform

[18] "Federal election activity" includes voter registration activity during the 120-day period before a federal election, GOTV, voter identification, and generic campaign activity conducted "in connection with" an election in which a federal candidate is on the ballot, and "public communications" that promote or attack a "clearly identified candidate for Federal office." 2 U.S.C. § 431(20)(A). The definition excludes a broad range of state party activity. For example, Title I does not reach state party GOTV activity for elections with only state races on the ballot, state party contributions to state candidates, or "public communications" at any time that refer only to state and local candidates (other than GOTV and voter registration), because they are not "[f]ederal election activity."

[19] Plaintiffs strain to find fault in the fact that the state party provision is framed in terms of activities on which state parties *spend* money. But Congress obviously framed § 441i(b)(1) in terms of funds "expended or disbursed for Federal election activity" to make clear that BCRA does *not* prohibit state parties from raising or using soft money, so long as state parties use such funds only for state or local election purposes. Section 441i(b)(1) is thus functionally identical to a limit on soft money contributions to state parties for federal election purposes. *Cf. Colorado II*, 533 U.S. at 438.

recognized that "a prohibition of soft money donations to national-party committees alone would be wholly ineffective."[20]

State parties played a central role in the soft money system. Indeed, state parties became the preferred conduits of soft money funds in federal elections, because FEC allocation regulations permitted them to spend a greater percentage of soft money on supposedly non-federal activity (such as GOTV, voter registration, and "issue" ads) than could be done if the national party spent the money. SA 516-22(K), 1231-38(L); Magleby Rep. 37 (JA 1510). For that reason, in the 2000 election cycle alone, the national parties transferred $280 million in soft money to the state parties. SA 490-91(K), 1188-89(L).

State parties told their soft money donors that their generosity had "delivered Ohio for President George W. Bush," *see* RNC OH 0410155 (IER, Tab 10), enabled the California Democratic Party to "increase the number of Californian Democrats in . . . Congress" and "deliver[ed] California's 54 electoral votes for President Bill Clinton[]," SA 526(K). National parties and federal candidates also routinely directed donors to contribute soft money to state parties for deployment in federal elections. Many state parties were effectively reduced to "offshore banks" for national parties, useful principally to inject soft money into federal elections in compliance with the national parties' directions—a phenomenon well documented by the Thompson Committee that investigated abuses in the 1996 elections (and discussed in the amicus brief for former Senator Thompson, at 24-26).[21]

[20] *The Constitution and Campaign Reform: Hearings on S. 522 Before the Sen. Comm. on Rules and Admin.*, 106th Cong., 2d Sess. 301 (2000) (statement of Bobby R. Burchfield, Partner, Covington & Burling).

[21] Green Rebuttal Rep. 10 (JA 1239); Thompson Comm. Rep. 4467-68 (state parties acted as conduits to pay for DNC issue ads); *id.* at 8300 (minority views) (RNC memo described buying ads through state parties as "simply a book keeping hassle"); SA 522-25(K), 1234(L) (national parties

The record also shows that massive soft money donations to state parties gave rise to the familiar risks of actual and apparent corruption. For example, Carl Lindner, chair of Chiquita Brands and a longtime Republican donor, gave more than $500,000 to *Democratic* state parties only hours after the Clinton administration asked the World Trade Organization to examine European Union trade barriers against Chiquita bananas.[22] The Thompson Committee found that, in exchange for $300,000 in soft money given to Democratic state parties and candidates and the DNC, the DNC assisted Roger Tamraz in his effort to win backing for an oil pipeline in the Caucasus by arranging meetings with government officials and with President Clinton—against the recommendation of National Security Council staff. Thompson Comm. Rep. 43-44, 2907-31; *id.* at 7519 (minority views). That Committee also found that Native American tribes that operated casinos gave significant soft money contributions to national and state Democratic committees after the DNC Chair contacted Clinton White House officials about those tribes' opposition to the casino application of a rival tribe, and the Department of the Interior denied that casino application (overturning a contrary staff recommendation). Thompson Comm. Rep. 44-46, 3167-94.

b. Plaintiffs implausibly suggest there is no danger of corruption or appearance of corruption when a corporation or union makes a $100,000 donation to a state party to engage in federal election activity supporting a federal candidate, and argue that Congress was not justified in bringing state parties within the prohibition of use of soft money in federal elections. But there is no reason to believe that a federal officeholder would be less willing to heed the wishes of a donor that generously funded activities assisting his election merely because the funds happened to be deployed

retained control over soft money after it was transferred to state parties); La Raja Cross, Ex. 3 at 49 (state parties became "branch organizations" implementing "strategic decisions of party professionals in Washington").

[22] McCain Dec., Ex. I (Weisskopf, *The Busy Back Door Men*, Time, Mar. 31, 1997, at 40 [INT 001289-90]).

through a state party. If, as plaintiffs suggest, Congress is constitutionally barred from regulating state parties that engage in federal election activity, then in the future, soft money donors will simply write their checks to state parties for use in federal election activity and make their generosity known to federal candidates. Thus it was essential for Congress to bring state parties' federal election activity within the soft money restrictions, as opponents of the ban recognized. Congress's constitutional authority to protect the integrity of federal elections is not diminished merely because the threat comes through state-party activity that indisputably affects federal elections.[23]

Congress has also limited the effect of the soft money restrictions on state parties. First, BCRA's definition of "[f]ederal election activity" in § 431(20)(A) excludes a broad range of state election activity, thus ensuring that the restrictions do not intrude too far into state-party activity (*see* p. 28 n.18). Second, Congress has allowed state parties to make some use of soft money even in federal elections. Just as, before BCRA, the FEC allowed state parties to use a combination of soft and hard money for activities that could affect both federal and state elections, the Levin Amendment, 2 U.S.C. § 441i(b)(2), authorizes a new kind of allocation formula permitting use of combinations of limited soft and hard money in federal elections. This authorization, however, is subject to provisos designed to prevent a resurgence of the pre-BCRA system in which state parties were

[23] Indeed, if Congress has no constitutional authority to regulate soft money used by state parties in connection with federal elections, then it is difficult to see how the FECA regime before BCRA could have been constitutional. Even then, both national and state parties that conducted GOTV, voter registration, and generic campaign activity in connection with an election in which a federal candidate was on the ballot were required to allocate their disbursements for such activity between hard and soft money, under the rationale that both federal and state interests were implicated by elections featuring both federal and state races. 11 C.F.R. §§ 106.1, 106.5 (2001).

used as conduits of unlimited soft money into federal elections.[24]

When States opt to hold state elections simultaneously with federal elections, Title I incidentally restricts state parties from using soft money for some activities that affect state races. That does not establish, however, that Title I *regulates* the state elections or otherwise exceeds Congress's Article I powers. Once Congress has balanced the competing policy considerations and has determined that the use of soft money in "[f]ederal election activity" so affects the integrity of federal elections as to warrant the exercise of its Article I powers, the courts have no warrant to reweigh the federal regulations against any incidental effect on the funding of state campaign activity. The necessary and proper scope of laws to ensure the integrity of federal elections "are matters for congressional determination alone." *Burroughs* v. *United States*, 290 U.S. 534, 547-48 (1934). Thus, as the Court held more than a century ago, "[i]f for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of [federal officials], Congress will not be thereby deprived

[24] Although plaintiffs have sought to portray the Levin Amendment as an onerous restriction on state parties, in fact it accommodates state parties by creating an exception to BCRA's restrictions on their use of soft money for federal election activity. Like the provision upheld in *Buckley* that allowed individuals to contribute more to political committees than to candidates, the Levin Amendment thus "enhances the opportunity . . . to participate in the election process." 424 U.S. at 35.

Under the Levin Amendment, a state or local party committee may use combinations of hard money and soft money (including money obtained from corporations and unions), under allocation formulas established by the FEC, for certain kinds of federal election activity, such as voter registration and GOTV activity that does not refer to a clearly identified candidate for federal office. "Levin funds" (soft money used in the allocation) must be raised locally—*i.e.*, by the state or local committee that makes the disbursements, and not solicited by or received from another party committee or a federal officeholder; a donor may not contribute more than $10,000 per year in Levin funds to any particular party committee; and Levin funds may not be used for any activity referring to a clearly identified federal candidate. 2 U.S.C. § 441i(b)(2)(B), (C).

of the right to make regulations in reference to the latter." *Ex parte Siebold*, 100 U.S. 371, 393 (1879). Nor does Title I intrude on state sovereignty in any manner implicating the Tenth Amendment or other structural features of the Constitution. Unlike statutes this Court has found to contravene principles of state sovereignty, BCRA does not require the States to do or not do anything.[25]

c. As with the national-party ban, Judge Leon concluded that the restrictions on state-party use of soft money could be validly applied only to those activities that, in his view, "directly" benefit candidates for federal office. SA 1118-42. Again, Judge Leon's reasoning is flawed. Congress determined, based on its experience, that GOTV, voter registration, and generic campaign activity conducted in connection with or close proximity to federal elections often are intended to and in fact do influence the outcome of such elections. Congress was therefore justified in acting to protect the integrity of federal elections by restricting state parties' use of soft money for federal election activity.

The parties point to an advertisement run by the California Democratic Party opposing Proposition 209 as an example of the purportedly excessive coverage of Title I. The parties do not dispute that such advertisements could well affect the outcome of a federal election, but they nonetheless contend that such advertisements cannot create a risk of corruption or appearance of corruption of a federal candidate. But Congress recognized that a donor can secure undue influence with a federal candidate by making a massive donation to a state party, intending that the state party then use those funds for "[f]ederal election activity" (such as GOTV activity or generic party advertising) in connection with that candidate's election. It is not significant whether (for example) the state party's GOTV activity funded with that soft money highlights a ballot initiative or a gubernatorial race; either form of GOTV activity affects a federal elec-

[25] *Cf. Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

tion on the same ballot—as the press understood in the context of Proposition 209.[26] The risks of corruption and appearance of corruption inhere in both, and stem from the fact that the donor can make it known to the federal candidate that his election was assisted by the donor's generosity.

The parties contend (Br. 54-56) that even that part of the soft-money restrictions that Judge Leon would have left intact, which prohibits parties from using soft money for any "public communication" referring to a clearly identified candidate for federal office (§ 431(20)(A)(iii)), is unconstitutional because it applies even when parties do not engage in "express advocacy" for or against a candidate, and thus could intrude on pure issue advocacy. That argument is meritless. This Court made clear in *Buckley* that political parties exist for the purpose of engaging in campaign activity, and so there is no need to differentiate between their campaigns and other activity. In *Buckley*, the Court construed a provision limiting independent expenditures by *individuals and interest groups* to cover only express advocacy. 424 U.S. at 40-42. But when the Court considered a separate provision requiring reporting and disclosure by *political committees* (including political parties) making campaign-related expenditures, the Court noted that the term "political committees" in that context reached only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," not groups "engaged purely in issue discussion." *Id.* at 79. The Court explained that "[e]xpenditures of candidates and of 'political

[26] Press reports indicated that the state parties' political activity over Proposition 209 was closely connected to their efforts to affect the 1996 presidential election, which was on the same ballot. "[P]olitical partisans promoted [Proposition 209 and similar measures] as a way of getting 'their' voters to the polls," and "the California Republican Party subsumed backing of [Proposition 209] into a get-out-the-vote drive for Bob Dole." Stall & Morain, *Prop. 209 Wins, Bars Affirmative Action Initiatives*, L.A. Times, Nov. 6, 1996, at A1; *see* Wooster, *California Fights The Race Wars*, Am. Enter. 54 (2000). The ad in question decried Proposition 209 as a "Republican Scheme," urged voters not to "let the Republicans get away with it," and exhorted voters to go to the polls. Feingold Dep., Ex. 15.

committees' so construed ... are, by definition, campaign related." *Id.* *Buckley* thus establishes that, because political parties are presumed to engage in campaign activity, regulation of their financing does not intrude on pure issue advocacy.

5. Related Anti-Corruption And Anti-Circumvention Provisions

Congress enacted further measures in Title I to ensure that political actors do not continue established means of circumventing FECA's hard money restrictions. Plaintiffs devote a significant portion of their briefing to challenging these measures. The pattern in their briefs is to urge the broadest imaginable construction of each provision, posit its application to a remotely conceivable situation, and then contend that that application would be unconstitutional, and so the entirety of Title I must fall. The irony in this position is striking: one can imagine the reaction of one of the political party plaintiffs if the FEC advanced such expansive readings of the statute in an enforcement action against it—in contrast to this case, where it serves the parties' goals to make Title I seem draconian. And of course, the duty of the courts is to save the law, not to adopt constructions that might imperil it. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979).

Plaintiffs are essentially attempting to convert a pre-enforcement facial challenge to BCRA into an as-applied challenge to factual scenarios that may never arise. Even under the relatively generous standards of First Amendment doctrine, statutes are not to be invalidated based on "hypothetical application to situations not before the Court." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 743 (1978); *see Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985). Rather, to prevail in their facial challenge, plaintiffs must demonstrate "a substantial risk that application of the provision will lead to the suppression of speech." *NEA* v. *Finley*, 524 U.S. 569, 580 (1998); *see City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (stressing that a statute is not facially invalid merely because "one can conceive of some

impermissible applications"). Plaintiffs have not made that showing.

a. *Solicitations By Federal Candidates.* BCRA added 2 U.S.C. § 441i(e), which imposes fundraising restrictions on federal candidates (including federal officeholders). Section 441i(e)(1)(A) prohibits federal candidates from raising, transferring, or spending soft money (whether for a national or a state party or otherwise) in connection with a federal election. Section 441i(e)(1)(B) then extends to non-federal elections the requirement that federal candidates solicit only funds subject to FECA's rules on sources and amounts. Thus, a federal candidate may raise money for others to use in federal and state races as long as the funds raised would not contravene the federal contribution limits or the prohibitions on contributions by corporations and unions.[27]

These provisions are aimed at the core problems of corruption and appearance of corruption that underlie FECA in general and the party contribution limits of Title I in particular. Large donations made at the request of federal candidates and officeholders create the risk that the donor will acquire (or appear to acquire) undue influence as a result of

[27] Congress further narrowed these quite reasonable restrictions with three exceptions that accommodate competing policy considerations. Section 441i(e)(2) makes the general rule against solicitation of soft money inapplicable if the money is to be used only for a state race in which the federal officeholder is running. Under § 441i(e)(3), a federal candidate may "attend, speak, or be a featured guest at a fundraising event for a State, district or local committee of a political party." Under § 441i(e)(4)(A), federal candidates may solicit unlimited funds for organizations that are tax exempt under IRC § 501(c)—even groups that engage in some "federal election activity," so long as that is not their principal purpose—if the solicitation does not specify how the funds will be spent. Under § 441i(e)(4)(B), candidates may explicitly solicit funds for use by IRC § 501(c) groups for voter registration or GOTV activity, or for 501(c) groups principally organized to engage in such activity, if the solicitation is made only to individuals and the amount solicited from any individual does not exceed $20,000 in a calendar year. These closely drawn measures serve the valid goal of eliminating the appearance of corruption of federal candidates through contributions that are excessive or from impermissible sources, while avoiding overreaching into state political activity.

the requester's gratitude. Indeed, when soft money was solicited, links were often drawn between massive donations and pending legislation—as demonstrated by national-party documents in the record, including "call sheets" prepared for fundraising calls, which emphasized legislative and regulatory matters of interest to solicitation targets. *See* IER, Tabs 1.A., 1.E., 3. These risks are also present when a federal officeholder asks a corporation or union to donate $100,000 to a state party or candidate. A federal officeholder cannot be expected to ignore the fact that a donor has made a substantial contribution at his request to a political ally.

b. *Solicitations By National-Party Officers.* Plaintiffs spill much ink over § 441i(a)(2), which extends the national-party soft money solicitation ban to the national parties' officers. This provision recognizes that political parties, like all artificial entities, necessarily act through their officers and agents. It thus ensures that a national party may not circumvent the basic soft money solicitation ban by claiming that the fundraising was done by its officers, not itself.

The parties strain to manufacture a constitutional flaw in this provision by arguing that it broadly prohibits national-party officers from soliciting even *hard* money for state candidates, even in a year in which no federal candidate is on the ballot (*see* Br. 1). This construction is, to say the least, not compelled by the language of § 441i(a), which bars national-party officers from soliciting only funds that are not "subject to the limitations, prohibitions, and reporting requirements of this Act"—much as § 441i(e) applies to bar solicitation of soft money by federal officeholders. Although some of the intervenors gave differing responses in their depositions when asked about the reach of § 441i(a)(2),[28] the Justice Department and the FEC, which are responsible for enforcing the campaign finance laws,

[28] *Compare* Feingold Dep. 166-67 (appearance of corruption when party officer is "in a position to seek unlimited contributions") *and* Meehan Dep. 236 (party officer may not "ask[] for unlimited amounts of money for a local election"), *with* Shays Dep. 237-40 (solicitation ban more restrictive for party officers than federal officeholders).

have made clear § 441(a)(2) does *not* prevent the national parties or their officers from soliciting hard money for state parties or candidates. Gov't D.Ct. Opp. Br. 25-26, 38 n.37; Gov't D.Ct. Reply Br. 30 n.34. Nor does the provision limit the amount of hard money a national party may raise and contribute to state candidates. It is quite revealing that the very first example of the supposed excesses of BCRA contained in the political parties' brief relies on a reading of the law that has been rejected by those responsible for enforcing it.

c. *Solicitations For And Transfers To Tax-Exempt Groups.* Section 441i(d) prevents political parties and their officers and agents from soliciting money for, or directing money to, certain organizations that are tax-exempt under § 501(c) and § 527 of the Internal Revenue Code. In the case of § 501(c) organizations, the prohibition applies only if the organization makes expenditures in connection with federal elections, including "[f]ederal election activity" as defined in § 431(20). Section 527 groups by definition are involved in election activities, and § 441i(d) forbids party fundraising for them only if they do not qualify as candidate committees or "political committees."[29]

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[29] Plaintiffs contend that § 441i(d) prevents state parties from donating funds to state groups formed to support or oppose the impending California gubernatorial recall election. In fact, § 441i(d) has no such application. California has scheduled the election for Oct. 7, 2003, which is not simultaneous with or near any federal election. Any activity undertaken by such § 527 groups concerning the recall therefore would not constitute "[f]ederal election activity," and § 441i(d) would accordingly not apply. *See* 11 C.F.R. § 300.37(a)(3)(iv). But even if California chose to hold the recall election with or near a federal election, § 441i(d) would impose only minimal burdens. To support or oppose the recall, state parties could themselves use soft money for many activities (including ad campaigns directed at the recall), Levin funds on other activities, and hard money on any remaining activities. State parties could also donate funds to § 527 groups formed to support or oppose the recall, provided those groups do not engage in "[f]ederal election activity" or are subject to FECA's reporting requirements. In short, all § 441i(d) prevents state parties from doing is funding federal election activity in a manner that evades FECA's contribution limits and reporting requirements.

Section 441i(d) prevents circumvention of FECA's disclosure requirements by ensuring that national and state parties do not direct or transfer hard or soft money to outside groups that are not subject to those disclosure rules, for use in federal election activities. In the past, Congress had witnessed exactly such evasions.[30] It also prevents circumvention of the requirement that state parties use only hard money and Levin funds for federal election activities. Absent § 441i(d), state parties could sidestep that requirement by soliciting soft money for, or directing or transferring soft money to, tax-exempt groups that undertake voter mobilization campaigns concentrated on core party voters.

d. *Public Communications About Federal Candidates By State Candidates And Officeholders.* Finally, § 441i(f) deals with the very narrow situation in which a candidate for state office or state officeholder makes a "public communication" that refers to a clearly identified candidate for federal office and either promotes or opposes that candidate.[31] In that instance, hard money must be used to finance the communication, for the obvious reason that it relates directly to a federal election. This provision is analogous to the state-party hard money requirement for "public communications" of this type. It also serves to close a potential loophole: without it, state parties could shift soft money to their closely allied state candidates and officeholders to use for "public communications" promoting or attacking federal candidates.

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[30] 144 Cong. Rec. S1048 (Feb. 26, 1998) (Sen. Glenn), S977 (Feb. 25, 1998) (Sen. Levin), S898 (Feb. 24, 1998) (Sen. Ford); Thompson Comm. Rep. 4013; *id.* at 4568, 5974-81 (minority views).

[31] The restriction in § 441i(f) presumably does not apply when a state officeholder makes a communication in his public capacity with public funds. Section 441i(f)(2) also provides an exception if the federal candidate or officeholder referred to is also a candidate for state office and the communication refers to such person in connection with the state election in which he or she is participating.

C. Political Parties Will Remain Vibrant

Although the First Amendment affords protection to the right to "amass[] the resources necessary for effective advocacy," that right is not infringed by contribution limits unless they are "so radical in effect as to render political association ineffective . . . and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397; *see Buckley*, 424 U.S. at 21-22. Plaintiffs have not made even a colorable showing that the soft money restrictions will impair the ability of political parties to engage in effective advocacy, or to assist their candidates in doing so. Their Chicken Little assertions about the impending demise of political parties are implausible and contrary to experience.

As former DNC Chair Donald Fowler (who was also a state party chair) and former RNC Chair William Brock stated, restricting soft money is likely to strengthen both national and state parties—by encouraging them to reinvigorate their support among numerous smaller contributors and volunteers, rather than rely on a few donors who are willing to write massive checks but who are often more interested in promoting particular federal candidates than in the party's long-term health. *See* Fowler Dec. ¶¶ 12, 17 (JA 262, 264); Brock Dec. ¶¶ 6-7 (JA 170-71). Former Senator Brock explained (JA 170):

> The reliance of the major national parties on soft money donations does not in fact strengthen the parties, it weakens them. The focus on raising and spending soft money to affect federal elections divorces both the national and state parties from their roots. The money by and large is not used for "party building." To the contrary, the parties by and large use the money to help elect federal candidates . . . . Far from reinvigorating the parties, soft money has simply strengthened certain candidates and a few large donors, while distracting parties from traditional and important grassroots work.

Moreover, political parties are highly flexible organizations that have successfully adapted to previous regulations and can adapt to new ones. La Raja Cross, Ex. 3 at 37, 148; Green Rep. 5-6, 30 (JA 1193-95, 1226). In many States, political parties have long been subject to restrictions far more stringent than those imposed by federal law, yet state parties have thrived. *Id.* at 33-34 (JA 1229-32).

Nor will the soft money restrictions starve the parties of funds needed for effective campaigning. Soft money represented a small percentage of the national parties' resources before the mid-1990s, yet they performed robustly. SA 32-35(PC); Mann Rep. 18 (JA 1551), tbl. 2 (App. 51a); *id.* at chart 1; Brock Dec. ¶ 7 (JA 170-71); Fowler Dec. ¶ 12 (JA 262). The parties have also been very successful at increasing their hard money receipts. The national parties almost doubled their hard money between the 1992 elections and the 2000 elections, and raised $741 million in hard money in the 2000 election cycle. Green Rep. 30 (JA 1226). State parties' hard money receipts rose from $111.2 million in 1991-92 to $309.6 million in 2000. Biersack Dec. tbl. 11.

The parties will continue to have access to enormous financial resources. BCRA expands their access to hard money: it increases the amount an individual may contribute to any national-party committee by 25%, to $25,000 per year, and to any state party committee by 100%, to $10,000 per year. 2 U.S.C. § 441a(a)(1)(B), (D). There is no reason to doubt the parties will take advantage of these increased limits and step up their efforts to raise hard money from a broader array of individuals, instead of the narrow group of corporations, unions, and large donors that provided soft money in the past. Green Rebuttal Rep. 5-6 (JA 1193-95). As Mark Twain might have said, then, plaintiffs' reports of the death of the political parties are greatly exaggerated.[32]

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[32] Indeed, information from FEC disclosure reports from the first half of 2003 confirms that the six major national-party committees raised more hard money ($160 million) in those six months than they raised in *combined hard and soft money* ($138 million) in the first six months of the last presidential election cycle (January-June 1999). This hard money take in 2003 is *double* the $80 million in hard money that the parties raised in the first half of 1999. If the parties continue to double their hard money

II. TITLE II OF BCRA IS CONSTITUTIONAL

Unlike political parties, whose expenditures "are, by definition, campaign related," *Buckley*, 424 U.S. at 79, corporations, unions, and other interest groups sponsor both communications that *are* related to federal election campaigns, and others that are *not*. As to the former, Congress may impose both disclosure rules and requirements that corporations and unions use only money voluntarily contributed by individuals for political use. *Id.* at 74-75; *Austin*, 494 U.S. at 668-69. For many years, the "express advocacy" test that *Buckley* fashioned to identify which communications were campaign-related worked reasonably well. Despite isolated instances of circumvention, it was generally understood that ads praising or criticizing federal candidates were required to honor FECA's disclosure and source restrictions.

Beginning in 1995, however, that understanding completely changed. A trickle of marginal abuses became a tidal wave of circumvention. "Express advocacy" as a standard for electioneering became worse than irrelevant: it became an object of public derision. Here, for example, is the chair of the NRA's PAC, speaking in 1997 SA 673-74(K):

> Today, there is erected a legal . . . wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it.

Title II of BCRA seeks to re-clothe the emperor by supplying an effective, objective standard for whether an ad is campaign-related. Under Title II, an ad is subject to disclosure and source requirements if it is broadcast, mentions a candidate, is geographically targeted to the candidate's electorate, and is run in the 60 days before a federal general election or the 30 days before a primary. That bright-line test is the product of objective data and experience, which confirm the common-sense reality that in these carefully limited circumstances, ads naming a candidate are very likely

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take, they will raise $1.5 billion in hard money during the 2004 cycle. *See* http://www.opensecrets.org/parties/index.asp.

intended to convey—and almost certainly will convey—an electioneering message.

Plaintiffs contend that any test other than "express advocacy" is invalid on its face. The Court should evaluate that contention in the light of the overwhelming evidence that in recent years interest groups, prominently including several of the plaintiffs, utterly buried the test they now come to praise. Nothing in the Constitution required Congress to resign itself to the open evasion of FECA's source and disclosure rules. In Title II, it made another "'cautious advance'" in the long history of "careful legislative adjustment of the federal electoral laws" to reflect ongoing experience. *NRWC*, 459 U.S. at 209. It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not "unnecessarily circumscrib[e] protected expression." *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982).

Plaintiffs' rhetoric notwithstanding, nothing in Title II "bans" any speech. For individuals it requires only disclosure, and only when expenditures for campaign ads exceed $10,000 per year. Corporations and unions remain entirely free to run any ad at any time—even in the targeted circumstances addressed by Title II, so long as they use funds raised by their PACs. As the Court recently reiterated, it is "simply wrong" to characterize that limitation as a "complete ban." *Beaumont*, 123 S. Ct. at 2211. The Court has upheld just such modest burdens on independent campaign expenditures as narrowly tailored to serve compelling public interests in informing the electorate and preventing corruption of the electoral process. It should similarly reject plaintiffs' facial challenge to reforms carefully designed to make FECA's source and disclosure rules effective once again.

A. Plaintiffs Aggressively Exploited The "Express Advocacy" Test To Circumvent Longstanding Source And Disclosure Rules

The record shows that beginning in earnest with the 1996 election, corporations and unions found that under the "express advocacy" test they could easily design broadcast

campaign ads that focused on candidates and swayed elections, while avoiding FECA's source and disclosure rules.[33]

1. The Ads Themselves

The most direct evidence is the ads themselves. The district court quoted the following ad, run by the AFL-CIO during the 60 days before the 1996 election in the district of a targeted Republican Congressman, as just one example of the type of "issue" ads run by unions and corporations:

> [Narrator] What's important to America's families? [Middle-aged man] "My pension is very important because it will provide a significant amount of my income when I retire." [Narrator] And where do the candidates stand? Congressman Steve Stockman voted to make it easier for corporations to raid employee pension funds. Nick Lampson opposes that plan. He supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

SA 38-39(PC). There is no doubt this was a campaign ad, specifically intended to influence votes in the upcoming election. Yet because it did not actually say "Vote for Lampson," the AFL could pay for it with general treasury funds, and make no disclosures under FECA.

Here are a few more examples. Each avoids the "magic words" of "express advocacy," and each could be said to address some "issue"—yet each was also clearly intended to influence a federal election:

- An ad run by "Citizens for Reform" during the 1996 Montana congressional race involving candidate Bill Yellowtail: "Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order ... but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." Thompson Comm. Rep. 6304-05 (minority views).
- An ad run on the eve of the 2000 presidential election, alleging that Myanmar used "slave labor to assist the building of an oil pipeline by American company Haliburton" under Dick Cheney's leadership. The tag-line: "[W]e just can't trust Dick Cheney a heartbeat away from the presidency."[34]
- An Americans for Job Security ad, run close to the 2000 election in Washington State, criticizing Senate candidate Maria Cantwell's legislative voting record on taxes from 1993, even though she was not in office in 2000, and could not vote on any issue unless elected to the Senate. The tag-line: "Can we afford politicians like Maria Cantwell?" App. 2a.

There are many, many more. We have included "storyboards" for some others in an Appendix to this brief (at 1a-10a). In addition, Volume 48 of the defendants' exhibits below contains audio and video copies of some ads, and storyboards for virtually every distinct television ad sponsored by an interest group in 1998 and 2000 that referred to a federal candidate and ran within 60 days of the general election. By way of comparison, it also includes examples of the very different ads that do *not* mention candidates, and of the very similar ads run *by* candidates. This volume by itself demonstrates the problem Congress faced.

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[33] The history and nature of the "issue" ad problem, the need for reform, and related evidence are discussed in the opinions below at SA 38-40, 92-99, 106-128(PC); 651-770, 776-886(K); 1146-1159, 1296-1379(L). The expert discussions of Kenneth Goldstein, Jonathan Krasno and Frank Sorauf (testifying jointly), and David Magleby are excerpted at JA 1150, 1272, 1476, and may be found in the record at DEV 1, Tabs 2 and 7, and DEV 4, Tab 8.

[34] App. 1a. Data about ads from 1998 and 2000 are generally derived from the "CMAG database." *See* Goldstein Rep. 5-8 (JA 1157-61).

2. "Issue" Ads Were Designed To Influence Federal Elections

This case might have a different cast if plaintiffs could credibly claim that the candidate-centered ads they ran before BCRA, and that would now be covered by Title II, were designed only to spread their views on public issues—with perhaps some dim awareness that they "[might] in some cases indirectly influence election outcomes by addressing issues of interest to the electorate." AFL Br. 7. Instead, the record demonstrates that plaintiffs and other sponsors of candidate-specific "issue" ads designed, tested, and ran them with an unmistakable electioneering purpose. *See* SA 678-99(K), SA 1315-26(L).

a. *Consultants And Pollsters.* The seasoned professionals that sponsors hired for their "issue" ad campaigns understood the mission: Devising hard-hitting *electioneering* messages that would sway the conduct of *voters* in federal elections. For example, as part of the AFL's pioneering "issue" ad campaign in 1996, which involved a series of ads criticizing Republican incumbents for having cast votes contrary to the AFL's positions, a firm called "Campaign Consulting" assessed potential political advertising agencies. SA 680(K). It assured the union

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Mitchell Dep., Ex. 6 (JA 2169).

In evaluating "political media consultants," the same advisor noted that

REDACTED Mitchell Dep., Ex. 7 (JA 2166); SA 680(K).

Business interests

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Josten Dep. 20-21. They formed "The Coalition: Americans Working for Real Change" to respond in kind. SA 685-86(K); *see* 1320-23(L). The consultant who landed the job of assisting The Coalition opened his proposal, "Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." SA 686(K), 1321(L). Similarly, in August 2000 the NRA's media consultant produced a memo entitled "NRA National Election Media Recommendations," listing, as the first objective, "influence outcome of presidential election and ... key congressional seats in 10 'battle ground' states." SA 693(K), 1324(L).

Sponsors' polling tells the same story. Before running its 1996 "electronic voter guides," the AFL evaluated possible ads comparing an incumbent (identified as a Republican) and a challenger (identified as a Democrat).

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Mitchell Dep., Ex. 9 (JA 2176).

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Id. (JA 2176).

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Mitchell Dep., Ex. 10 (JA 2178); *see* SA 679(K). Likewise, The Coalition surveyed "voter attitudes nationwide," measuring reactions to "the AFL-CIO's claims."[35] A survey of "swing voters" showed that test "response ads" moved "25% of participants ... closer to voting for a Republican candidate."[36]

b. *Sponsors' Statements.* Ad sponsors' own statements confirm that influencing voters was a prominent goal of their candidate-centered "issue" ads. In 1996, the AFL-CIO did not hide its objectives. As the press reported:

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[35] Huard Dep., Ex. 2, at TC513 (JA 2153); *see id.* at TC514 (JA 2154) ("Most voters view the AFL-CIO as first and foremost a political entity ...."); *id.* at TC538 (JA 2158)

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[36] SA 687(K); Huard Dep., Ex. 4, at AV139 (JA 2127) (purpose of research is "[f]inding a message for" an "outside voice" to "come to the[] defense" of Republicans "under attack by AFL-CIO advertising," to "even [the] playing field during the 1996 election"); *see* Huard Dep. 37-38, 103, Ex. 6B (JA 2159-60), REDACTED Ex. 18 (JA 2131-32).

> [U]nion leaders . . . said they believe they have a legitimate chance to reverse the Republican majority in the House. . . . AFL-CIO President John Sweeney, who presented the election plans to a closed-door meeting of the federation's ruling executive council, said unions would spend $35 million in the election campaign.[37]

Much of that $35 million was spent on broadcast "issue" advertising. SA 681-82(K). After the election, the AFL's political director reiterated that one of its "major [campaign] goals" in running the ads had been "to try to help defeat some of those members of Congress and replace them with some members who would be more friendly to working people."[38] AFL President Sweeney boasted that by spending "our money on an independent, *issue-based television*, direct mail, and door-knocking campaign, rather than donating it to any political party," the AFL had "defeated 17 of the ugliest Americans ever to serve in the United States House of Representatives." Mitchell Dep., Ex. 12 (emphasis added).

Similarly, the NRA's Executive Vice President agreed that defeating Al Gore was the "overriding NRA objective" in 2000. LaPierre Dep. 55-56; *see id.* at 237-42. An NRA fundraising letter declares: "If the NRA had remained silent during the final 60 days of the last election, Al Gore would be president today." NRA02586 [DEV 120]. And another explains that the "millions" the NRA "spent . . . to defeat Al Gore . . . got our message out, drove our supporters

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[37] Mitchell Dep., Ex. 5 (Swoboda, *AFL-CIO to Target 75 House Districts*, Wash. Post, Jan 25, 1996, at A16); *see also, e.g.*, Gugliotta, *Interest Groups' Spending Had Varied Success*, Wash. Post., Nov. 7, 1996, at A28 ("'Incumbents with anti-working family records were defeated in 19 congressional districts where the labor movement ran aggressive ground and/or ad campaigns around working family issues,' said AFL-CIO President John Sweeney. 'Working families are back as a political force.'").

[38] Talk of the Nation (NPR radio broadcast, Nov. 27, 1996) (quoting AFL's political director, Steven Rosenthal); D. Beck et al., *Issue Advocacy Advertising During the 1996 Campaign* 11-13 (Annenberg Pub. Pol'y Ctr. 1997).

to the polls, and changed history." LaPierre Dep., Ex. 3 (JA 924); *see* LaPierre Dep. 100 (indicating that spending referred to included money for "infomercials and spot ads, both on television and radio"); SA 693-97(K) (discussing evidence that NRA used "issue" ads to influence 2000 election).

A major Democratic contributor also testified:

> I have been approached by interest groups, such as NARAL and the League of Conservation Voters, with appeals for large donations to be used for broadcast advertisements that will help federal candidates whom the groups know I support. Groups like these know of my interest in the Senate, and they can be opportunistic in saying things like, "We think we can get Bill Bradbury elected in Oregon," or in talking about how they're going to go in and really help Debbie Stabenow.

Buttenwieser Dec. ¶ 19. Another recounted how "[t]he [Democratic] party recommended that I donate to certain groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election." Kirsch Dec. ¶ 10.

c. *Naming Candidates.* Certain common features of candidate-centered "issue" ads also demonstrate that they are intended—and overwhelmingly likely—to convey an electioneering message. They also help explain the choices Congress made when it framed Title II. Most obviously, such ads "almost always refer to specific candidates." SA 1312(L); *see id.* at 719(K). This is significant in part because, particularly in conjunction with other factors such as timing and targeting, it ties each ad directly to an upcoming election. Moreover, as veteran campaign consultants testified, "there is usually no reason to mention a candidate's name unless the point is to influence an election." SA 1312(L); Strother Dec. ¶ 7 (JA 2148); *see* Bailey Dec. ¶ 9 (JA 26). Rather, if the aim were only to address an issue, "invoking [candidates] might unnecessarily politicize the underlying

message ... and undermine [an ad's] effectiveness." Krasno/Sorauf Rep. 63 (JA 1345).

A related feature of many candidate-centered ads was a tag-line exhorting the viewer or listener to call and "thank" the named candidate, or "ask" or "tell" the candidate something. Campaign professionals know that, in context, these exhortations are equivalent to urging a vote for or against the named candidate. Beckett Dec. ¶ 8; Pennington Dec. ¶ 10 (JA 672-73); Lamson Dec. ¶ 6. As a senior NRA political operative put it, discussing an ad that urged viewers to call and "thank [a Congressman] for fighting crime":

> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did.... [T]hree months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.

SA 674(K); *see* Josten Dep. 230; G. Shea Dep. 46.

d. *Timing.* "Issue" ads naming candidates were heavily concentrated in the final weeks before an election. SA 725-28(K). The appendix to this brief includes (p. 11a) a graph from Judge Kollar-Kotelly's opinion vividly illustrating how ads mentioning federal candidates spiked in the weeks immediately before the 2000 election. The data confirm that 78% of interest group ads mentioning a federal candidate—and 85% of ads mentioning a presidential candidate—were aired within 60 days of the general election. Goldstein Rep. 19 tbl. 4 (JA 1169-71). In contrast, group ads that did *not* mention candidates were distributed fairly evenly throughout the year. *Id.* at 3 (JA 1155). Equally tellingly, candidate-specific ads *stopped*—cold—on Election Day. *Id.*

As an election nears, interest groups substitute ads that mention a candidate for ads that do not. SA 721-26(K). From January 1, 2000, through September 4, 2000, for example, a pharmaceutical industry-funded group called Citizens for Better Medicare (CBM) aired 23,867 television ads, without once mentioning a candidate. SA 690, 722(K). Between September 4 and the election, it ran 10,876 candidate-specific spots. SA 721(K). A similar pattern appears in the advertising of other groups, including the Chamber of Commerce, Planned Parenthood, EMILY's List, the Business Roundtable, and the League of Conservation Voters. SA 722-25(K).

Former consultant Douglas Bailey sums up: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." SA 720(K); *see* Bailey Dec. ¶ 12 (JA 27); Pennington Dec. ¶ 10 (JA 672-73); Goldstein Rep. 33 (JA 1186-87).

e. *Targeting.* Interest groups that ran candidate-specific ads close to elections also targeted candidates in close contests—and almost invariably in a partisan manner. SA 728-31(K). The AFL-CIO, for example, targeted its "legislative issue ads" in part based on whether they could have a "big impact" in "marginal district[s]"—that is, districts where races were likely to be close.[39]

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Huard Dep., Ex. 7; *id.* at 45-46 (JA 2172-73).

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Josten Dep. 269, 298 & Ex. 25. The NRA "target[ed] states ... where they intended to hopefully have an impact on the election." LaPierre Dep. 24-25; *see id.* Ex. 3 ("critical swing states") (JA 923).

The AFL's 1996 campaign targeted 32 freshman Republicans, SA 681(K), aiming to "reclaim the Congress from the extremists that snatched control in 1994."[40] The AFL's ad

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[39] Mitchell Dep. 17-20. The AFL's ads targeting then-Governor Bush ran in the nine states rated as "toss-ups" that had the most electoral votes at stake. CMAG Database; Cook & Co. Political Analysis, *The Cook Political Report 2000: The Race for the White House* (2000) [DEV 38 Tab 17].

[40] Mitchell Dep., Ex. 11. *See, e.g.*, Mitchell Cross 174, 178-79, 182 (no Democrat targeted in a broadcast ad in the 60-day period in 2000 or 1996).

campaigns also generally targeted candidates to whom it assigned the lowest lifetime voting "scores" on its issues. *Compare* G. Shea Cross, Ex. 2 (ratings), *with* Mitchell Dec., Ex. 1 (targeting).

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Monroe Cross 13-15.

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Monroe Cross 25, 26. A group intent on changing legislators' minds would not likely choose the hardest targets—nor focus its ads on candidates' *past* votes.

3. "Issue" Ads Concealed Sponsorship

The use of "issue" ads allowed sponsors to avoid FECA's disclosure requirements. *See* SA 91-99(PC) (summarizing evidence), 675-77(K), 1308(L). One prominent example is the Bill Yellowtail ad quoted above (p. 43-44), which was part of a campaign focused on various congressional races, mounted by a group calling itself "Citizens for Reform." Thompson Comm. Rep. 6305 (minority views). Recently organized as a nonprofit corporation, the group had "no . . . offices, staff [or] telephones," and it never disclosed under FECA the identity of its principals, what it spent on electioneering ads, or the sources of funds. *Id.* at 6301-05.

Similarly, CBM spent $65 million on television advertising in 1999 and 2000. SA 655(K), 1307(L). It held itself out as "a broad-based, bipartisan group representing the interests of patients, seniors, pharmaceutical research companies, doctors, caregivers, hospitals, employers, health care experts and many others concerned with . . . our Medicare system."[41] But its fundraising was conducted by the Pharmaceutical Research and Manufacturers of America, and almost all its funds for the 2000 elections came from corporate interests. SA 690-91(K), 1323(L). Yet before BCRA, no disclosure was required so long as CBM's ads did not use the "magic words."

[41] Citizens for Better Medicare, Who We Are, *available at* http://web.archive.org/web/20000815061032/www.bettermedicare.org/who (archiving the CBM website as of Aug. 15, 2000).

There are many other examples of identities, relationships, and interests masked from voters by ad sponsors using names such as "American Family Voices," "Voters for Campaign Truth," or "American Seniors, Inc." Krasno/Sorauf Rep. 71-72 (JA 1355-56); *see also, e.g.*, SA 97-99(PC) ("Republicans for Clean Air"), 643-44(K), 1252-53(L); Magleby Rep. 18-19 (JA 1484-85). Where ads named candidates, in their districts, just before elections, that practice deprived voters of just the sort of information that disclosure provisions are intended to provide. *See Buckley*, 424 U.S. at 66-68, 81-82.

4. Widespread Circumvention Destroyed The Efficacy Of The "Express Advocacy" Test

The development, long after *Buckley*, of candidate-centered "issue" ads quickly destroyed the efficacy of the "express advocacy" test as a means of identifying independent campaign expenditures. It is now clear that words of express advocacy are not necessary, or even necessarily desirable, to frame a campaign message. SA 658-64(K), 1296-99(L). Indeed, candidates, whose advertising is *all* electioneering, hardly ever use such words in their own ads, any more than companies tell consumers to "buy" their products. SA 1033(K), 1160 n.114(L). The *absence* of "express advocacy" thus indicates nothing about whether an ad is intended to or does convey an electioneering message. SA 664-75(K), 1299-1306(L). That is why the AFL's political director could comment, during the 1996 campaign, "If somebody handed me a magic wand and said there is no election law, I would do exactly what I am doing now." Clymer, *System Governing Election Spending Found in Shambles*, N.Y. Times, June 16, 1996, at A1 (quoting Steven Rosenthal). And it is why by early 1997 the Chair of the NRA's PAC could characterize the legal standard separating "issue advocacy and political advocacy" as "a line in the sand drawn on a windy day." SA 673-74(K), 1305(L).

Not surprisingly, groups' use of electioneering "issue" ads began "to rival, and in some cases outpace, advertising by federal candidates," Krasno/Sorauf Rep. 51 (JA 1331), and political parties themselves, Magleby Rep. 20 (JA 1487). One study of 17 competitive congressional races in 2000 found that interest-group spending on candidate-specific ads amounted to as much as two-thirds of what candidates themselves spent on radio and television ads. Magleby Rep. 22 (JA 1491). In the 60 days before the 2000 election, in eight battleground States, groups aired more than half as many ads about presidential candidates as did the candidates themselves. Goldstein Rep. 12 (JA 1164). And groups ran 20 "issue" ads naming candidates for every such ad run by their PACs. SA 656(K). In sum, as Judges Leon and Kollar-Kotelly concluded, widespread manipulation of the "express advocacy" test thoroughly sapped the force of the type of source and disclosure rules for independent expenditures that this Court approved in *Buckley* and *Austin*. SA 657-58(K), 1296-1302(L).

5. The Potential For Corruption

This Court has recognized that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978). Although the Court has previously found it unnecessary to rely on that specific type of corruption in order to uphold source restrictions on corporate expenditures, *see Austin*, 494 U.S. at 659-60, the record here shows just such a threat. *See* SA 708-19, 835-40(K), 1161-62(L).

"[T]he people who admit to running these ads will later remind Members of how the ads helped get them elected." Simpson Dec. ¶ 13 (JA 812). Indeed, any reminder may be superfluous:

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Huard Dep. 92.

From the candidates' point of view, "[a]n important element running through modern campaign plans is consideration of

what role political parties and interest groups are going to play in your campaign." Pennington Dec. ¶ 4 (JA 669). In 1996, for example,

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Josten Dep. 19-21.

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Josten Dep. 270; *see* SA 711-13(K).

Independent ad campaigns can thus be used to seek access and influence in much the same way as contributions. Candidates "pay very close attention to the political advertisements broadcast in their districts," and "keep track of who is helping them."[42] Former legislators confirm that "members realize how effective these ads are, and they may well express their gratitude to the individuals and groups who run them."[43] Lobbyist Wright Andrews, who advises a broad array of corporations and other groups, describes candidate-specific "issue" ads as simply "[a]nother practice used to secure influence in Washington." Andrews Dec. ¶ 17 (JA 6). In his well-informed view, "[a]n effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party." *Id.*

Thus, candidates can be as beholden to corporations or unions for an ad campaign as for a check. Yet before BCRA,

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[42] SA 709(K); Strother Dec. ¶ 13 (JA 2150); *see* Magleby Rep. 15; Pennington Dec. ¶ 8 (JA 671-72) ("In addition to trying to elect candidates, these groups are often trying to create appreciation or even obligation on the part of successful candidates."); Beckett Dec. ¶ 16 ("Of course candidates often appreciate the help that these interest groups can provide, such as running attack ads for which the candidate has no responsibility."); Chapin Dec. ¶ 16 ("Federal candidates appreciate interest group electioneering ads . . . that benefit their campaigns, just as they appreciate large donations that help their campaigns."); Bloom Dec. ¶ 17 (JA 54-55); Lamson Dec. ¶ 19.

[43] Simpson Dec. ¶ 13 (JA 811-12); *see* Bumpers Dec. ¶ 27 ("Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.") (JA 178).

expenditures on ads, unlike direct contributions, could be made with treasury funds, and without public disclosure. That situation "create[d] enormous opportunities ... for favors to be exchanged between issue advocates and public officials." Krasno/Sorauf Rep. 74 (JA 1357). And whether or not any actual exchange takes place, the appearance of corruption can be just the same. SA 713(K) (80% of poll respondents believed that a Member of Congress would likely give "special consideration" to the views of an individual, group, corporation, or union that spent $50,000 on broadcast political ads benefiting the Member).

B. Title II Is Narrowly Tailored To Serve Compelling Public Interests

Confronted with the collapse of the "express advocacy" test as an effective regulatory dividing line, Congress had a choice. It could accept that source and disclosure rules had been rendered a dead letter—despite this Court's decisions upholding the constitutionality of such rules when applied to campaign spending. It could create a new statutory definition of "campaign" spending that depended on some finding of electoral intent or effect—but that would surely be attacked as too vague and subjective in application. Or it could rely on available data, and its Members' experience, to frame an objective definition that would address the problem, without imposing even the modest burden of source and disclosure rules on any more speech than was necessary to restore the effectiveness of longstanding rules.

Title II responds narrowly and objectively to the circumvention problem. It does not "ban" any speech, and neither its disclosure rules nor its requirement that corporations and unions use their PAC funds imposes any great burden. Its definition of "electioneering communications" is limited to broadcast ads, because that is where abuse was most prevalent. It is further limited to candidate-specific ads that are targeted to the candidate's electorate, because those are the ads sponsors used in their electioneering campaigns. And it is still further limited to ads run in the final weeks before an election, because the objective empirical

evidence makes clear that, so limited, it will reach the vast majority of candidate-specific issue ads, at the time when they are almost certain to convey an electioneering message—while imposing even its modest burdens only during the carefully circumscribed period when they are most clearly necessary to serve compelling public interests.

This careful, experience-based adjustment of the definition of which advertising expenditures are campaign-related serves precisely the same interests that the Court has recognized in sustaining source and disclosure rules as applied to "express advocacy." Source restrictions prevent the conversion of organizational treasuries into political "war chests" that could be used to incur political debts from legislators. *Beaumont*, 123 S. Ct. at 2206.[44] They protect the individuals "'who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates whom they may oppose.'" *Id.* And they address the "corrosive and distorting effects" on elections that could otherwise arise when corporations and unions amass "aggregations of wealth" that may have "little or no correlation to [individuals'] support for the [organization's] political ideas." *Austin*, 494 U.S. at 660. Rules that permit campaign spending only from PAC funds are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Id.*; *see also Beaumont*, 123 S. Ct. at 2211.[45]

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[44] *Beaumont* dealt with a limitation on contributions, but its discussion of the interests served by source restrictions draws on cases involving expenditures (including *Austin*), and those interests are largely the same in both situations. *See* 123 S. Ct. at 2206-07.

[45] Plaintiffs argue (McConnell Br. 47) that under *Bellotti*, which involved corporate spending on an issue referendum, these interests do not support source rules for "political advocacy." Apart from distinctions between Title II and the law at issue in *Bellotti* which had, for instance, no temporal limitation, applied to all media, and did not provide for PAC spending, *see* 435 U.S. at 767-68 & n.2, that argument begs the question at issue here: How Congress may *identify* expenditures that relate to *candidate* elections. *See id.* at 788 n.26 ("[O]ur consideration of a corpora-

Disclosure rules, for their part, "shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures." *Buckley*, 424 U.S. at 81. Knowing who is spending money to support or oppose candidates "allows voters to place each candidate in the political spectrum more precisely," "alert[s] the voter to the interests to which a candidate is most likely to be responsive" while in office, and "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large . . . expenditures to the light of publicity." *Id.* at 66. Disclosure thus provides "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82; *see also, e.g.*, *Bellotti*, 435 U.S. at 792 n.32. And both source restrictions and disclosure serve the interest in preventing circumvention of other campaign finance rules. *Beaumont*, 123 S. Ct. at 2207; *Buckley*, 424 U.S. at 67-68.[46]

Source and disclosure rules serve these interests not only when an ad is run with the express or principal *purpose* of affecting an election, but also when it is likely to have such an *effect*. The record shows how Title II addresses widespread, conscious circumvention, involving ads run with unmistakable electioneering intent. Plaintiffs, however, focus on potential applications of BCRA's objective definition at its margins, where intent might be difficult to discern, or in a

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tion's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for public election to office").

[46] Title II's rules help prevent circumvention of Title I, which prohibits the raising of soft money that parties spent in part on campaign "issue" ads. That reform would be undermined if corporations or unions could substitute their own ad spending for party contributions, or if parties could divert contributions to nominally independent groups that would design and run such ads. *See* 145 Cong. Rec. S12,661-62 (Oct. 15, 1999) (Sen. Feinstein) ("Instead of giving soft money to political parties, the same dollars [could] be turned into 'independent' ads."); *see also* Thompson Comm. Rep. 5927 (minority views) (RNC contributions to non-profit groups), 5967, 5974-79 (RNC cooperation with such groups).

few cases might even be absent. It is therefore important to recognize that an ad's likely electoral effect is as salient as its sponsor's subjective motives in determining whether the burdens imposed by source and disclosure rules are constitutionally proportionate to the public benefits they provide. *See* Center for Gov'tl Studies Br. 13-15, 26-28.

It is also important to recognize that Title II's standards for defining which ads will be treated as campaign-related squarely serve a compelling interest in using clear and objective lines to frame any rule that affects speech. It was, after all, principally a concern for clarity that first led this Court to adopt the "express advocacy" test as a gloss on FECA's language. *Buckley*, 424 U.S. at 40-44, 79-80; *see* pp. 60-62. Twenty years later, that test proved too open to manipulation to remain effective. In responding, Congress heeded the Court's admonitions concerning vagueness. Plaintiffs have conspicuously failed to suggest any way in which Congress could better have reconciled the twin compelling goals of adequate coverage and necessary clarity.[47]

Finally, the nicety with which legal requirements must be tailored depends in part on the magnitude of the burdens they impose. *See, e.g.*, *Beaumont*, 123 S. Ct. at 2211 ("the difference between a ban and a limit" on speech is to be considered "when applying scrutiny at the level selected"); *Buckley*, 424 U.S. at 68 (in determining whether disclosure requirements are justified by the interests they serve, "we must look to the extent of the burden that they place on individual rights"). The burdens imposed by source and disclosure rules are modest—as this Court has recognized. *See Beaumont*, 123 S. Ct. at 2211 ("the PAC option allows corporate political participation without the temptation to use corporate funds for political influence"); *Austin*, 494 U.S. at 660-61; *Buckley*, 424 U.S. at 68, 82 (disclosure is "minimally restrictive"). Particularly in light of that circumstance, Title

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[47] *See* Foley, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth,"* 2 Elec. L. J. (forthcoming Oct. 2003), *available at* http://www.liebertpub.com/ELJ/Foley1.pdf (temporary pp. 7-12).

II's requirements are narrowly tailored to serve their compelling public goals.[48]

C. *Buckley* Did Not Establish "Express Advocacy" As A Constitutional Straitjacket

Plaintiffs argue that however ineffective the "express advocacy" test may have become, *Buckley* established it as a constitutional limit. The district court properly rejected that argument. SA 783-799(K), 1147(L). *Buckley* adopted a practical, limiting construction of particular statutory language that was impermissibly vague—not a constitutional standard that would foreclose Congress from redrawing the statutory lines as necessary to reflect experience and to make them effective.

Buckley explained that a provision imposing an absolute cap on independent campaign expenditures "'relative to' a candidate fail[ed] to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 41. Similarly, a provision for disclosure of independent expenditures made "for the purpose ... of influencing" nominations or elections raised "serious problems of vagueness," because it "could be interpreted to reach groups engaged *purely* in is-

[48] Appending a supposedly "representative" sample of legislative history, the NRA argues at length that Congress's purpose in enacting Title II was not, as in Title I, to prevent corruption and circumvention, but to protect incumbents from public attack. That is incorrect. As reflected in the excerpts from the legislative history collected in the appendix to this brief (at 12a-27a), Congress enacted Title II to serve the very purposes that underlie the preexisting independent expenditure provisions: bringing campaign spending of the "issue" ad variety within the scope of longstanding source and disclosure rules. *See, e.g.*, App. 14a (Sen. Snowe: "The record ... will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws."); *id.* (Sen. McCain: "This bill would simply subject soft money-funded campaign ads that masquerade as issue discussion to the same laws that have long governed campaign ads."). As Senator Thompson's amicus brief confirms (26-28), his Committee's path-marking investigation resulted in similar conclusions. *See* App. 22a-26a.

sue discussion," as well as those whose speech also involved "advocacy of a political result." *Id.* at 76, 79 (emphasis added). In each instance, the Court addressed the vagueness problem by construing the statutory language to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted); *see id.* at 44 & n.52.

In adopting the "express advocacy" construction, *Buckley* never purported to render all "issue" speech immune from source or disclosure rules. Even campaign speech that uses "express advocacy" typically also conveys issue messages—and, conversely, the Court recognized that electoral advocacy could be effective without being "express." 424 U.S. at 45 (noting that "express advocacy" test could permit circumvention of expenditure caps). Thus, the principal virtue of the "express advocacy" test was its clarity, not any perfect differentiation between campaign speech and pure "issue" speech.[49] Title II shares that same cardinal virtue—and does a much *better* job of identifying campaign speech, in light of extensive experience with the realities of the political marketplace. Such periodic statutory repair is a normal process—and the natural province of legislatures, not of courts. *See Beaumont*, 123 S. Ct. at 2205-06; *NRWC*, 459 U.S. at 209-10. It would make no sense to read any of this

[49] As plaintiffs point out (McConnell Br. 40, 42), both *Buckley* and the Court's later opinion in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which extended the "express advocacy" construction to the provision that imposes source restrictions on corporate and union campaign expenditures, linked the problem of statutory vagueness with that of overbreadth. That is hardly surprising. *See* p. 63. *MCFL*'s decision to adopt a parallel construction of two statutory provisions is equally unremarkable—particularly given Congress's own adoption of the "express advocacy" standard, after *Buckley*, in FECA's definition of "independent expenditure." *See* 2 U.S.C. § 431(17). Nothing in *Buckley* or *MCFL* suggests that any different congressional approach to defining campaign-related spending is automatically invalid.

Court's cases in a way that would disable Congress from acting on the lessons of experience.[50]

To the contrary, *Buckley* is more a roadmap than a constitutional stop sign. Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not "dissolve in practical application," 424 U.S. at 42; and they should be "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate," *id.* at 80; *see id.* at 76-82. Those are precisely the precepts to which Congress adhered in framing Title II.

D. Facial Invalidation Of Title II Would Be Especially Inappropriate

Plaintiffs contend that Title II is "overbroad under the First Amendment, and cannot be applied to [them]—or anyone else." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2196 (2003). They attack Congress's use of an objective definition of "electioneering communications," pointing to a few marginal examples of ads that would fall within the definition, yet might have no electioneering purpose or likely effect.

Such a challenge cannot succeed unless *plaintiffs* carry "the burden of demonstrating, 'from the text of [the law] and from actual fact,'" that Title II, "*taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep." *Hicks*, 123 S. Ct. at 2198. They must show that the "substantial social costs *created* by the overbreadth doctrine," when it results in the facial invalidation of a law that would have many valid applications, are outweighed by any potential "chilling effect" on speech in circumstances that might support an as-applied challenge. *Id.* at 2196-97;

[50] *Buckley* did not discuss independent expenditure provisions as applied to corporations or unions. In light of the long history of special treatment of these entities in campaign finance law, it surely makes no sense to read *Buckley*, or the simple adoption of a parallel construction in *MCFL*, to preclude Congress from taking further action to address the sort of massive corporate and union expenditures on campaign advertising that began in earnest ten years after *MCFL*.

see Broadrick v. *Oklahoma*, 413 U.S. 601, 614-15 (1973). "Facial invalidation 'is, manifestly, strong medicine,'" to be used "'sparingly and only as a last resort.'" *NEA* v. *Finley*, 524 U.S. at 580.

That cautious approach is particularly appropriate here. Plaintiffs argue as though source and disclosure rules may be applied only to conduct or to "unprotected" speech, and the question is whether Title II might stray beyond that line. *See* McConnell Br. 50. That approach is fundamentally misconceived. "Discussion of public issues," while surely protected speech, cannot be any *more* protected than speech, including "express advocacy," that relates directly to "'the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 14-15. Yet this Court has already made clear that it is consistent with the First Amendment for Congress to impose source and disclosure rules on independent campaign speech—in part because such rules involve no censorship, but only the source and transparency of campaign funding.

At the margins, Congress's new, objective definition of campaign-related speech might result in source and disclosure rules applying in a few situations in which the public interests they serve are not strongly implicated. But the manifestly compelling need for clear line-drawing in this sensitive area counsels deference to Congress's placement of the line—especially where, as here, its application never *prohibits* any speech, and imposes only limited burdens that are acceptable even as applied to fully protected speech.[51] In these special circumstances, the cost of facially invalidating rules of a sort this Court has previously held to be justified would be particularly high, while the benefits to be gleaned in terms of speech protection would be unusually low.

[51] *See, e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 208-10 (1992) (upholding, under strict scrutiny, a *ban* on campaign-related speech within 100 feet of polling places); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974) (recognizing "compelling" interest in bright-line one-year disaffiliation rule for candidates seeking to switch party sponsorship for ballot access).

Similarly, Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law. *See Hicks*, *supra*. That effect is of most concern when a law is vague. *See, e.g.*, *Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.6 (1982) ("[T]he vagueness of a law affects overbreadth analysis."). Here, Title II was specifically designed to *avoid* vagueness. *Cf. Broadrick*, 413 U.S. at 607. Moreover, at most, the law requires only that groups like the Chamber of Commerce, the AFL, and the NRA pay for some ads using PAC funds, rather than treasury funds. These corporate and union plaintiffs, which have or can easily establish PACs, are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.

1. Plaintiffs Have Not Demonstrated Substantial Overbreadth

In addressing plaintiffs' overbreadth challenges, we address first arguments of more general applicability, and then those involving the special situation of ideological nonprofit corporations such as the NRA and ACLU (*see* pp. 73-75).

a. *The Period Just Before Elections.* One conspicuous virtue of Title II is its narrow, evidence-based focus on the final weeks leading up to a specific federal election, involving the specific candidate named in a covered ad. *See* pp. 49-51, 56. Remarkably, plaintiffs attempt to use that important aspect of narrow tailoring as evidence of overbreadth. They argue that Title II would restrict their ability to address legislative issues that might arise in the period just before elections. Yet, any ad that triggers Title II is very likely to have some actual *effect* on an election, whatever its intent. In any event, BCRA does not stop anyone from speaking during the covered period. Sponsors may run even candidate-specific ads, targeted at the relevant electorate, so long as they disclose their sponsorship and funding, and use no corporate or union treasury funds. They can also craft ads addressing

legislative issues in ways that do not trigger Title II—avoiding candidate references, or using non-broadcast media, or avoiding the districts of mentioned candidates in the final weeks before their elections.[52]

It might be possible to describe a small category of ads that are facially covered by Title II, but have no likely electioneering intent or effect—for instance because they refer only to pending legislative issues, and refer to candidates only by saying, generically, "Call your Congressman." BCRA expressly authorizes the FEC to adopt regulatory exemptions if it is satisfied that they can be framed in a way that meets statutory criteria and does not open paths for abuse. 2 U.S.C. § 434(f)(3)(B)(iv). Indeed, as the NRA points out (Br. 36), the intervenor-defendants suggested to the FEC a narrow exemption of the sort just noted. The FEC determined, however, that the proposed exemption would leave room to design ads that nonetheless promoted or opposed candidates. 67 Fed. Reg. 65,201-02. No plaintiff appealed that decision. In any event, even without an exemption, plaintiffs cannot show that the burden of complying with Title II will be disproportionate to the compelling interests it serves in anything like enough cases to justify striking the law on its face.

Plaintiffs also argue that the public is most receptive to issue advocacy just before elections. If they mean that election time is ideal for public policy discussions wholly divorced from the electoral context, their argument is both

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[52] The NRA argues (Br. 44-50) that the statutory exemption for broadcast news and editorials is unconstitutional, because the world has changed so much in 13 years that this Court should revisit its rejection of that argument in *Austin*, 494 U.S. at 666-68. If and when Congress concludes that corporations are abusing their ownership of media outlets to interfere in federal elections using their treasury funds, it may consider whether it is necessary to adopt some statutory adjustment. Nothing in the NRA's submissions concerning the growth of the internet or changes in corporate ownership calls into serious question the unique role of the institutional press, or the permissibility of a media exemption as a matter of constitutional law. Indeed, an important purpose of that exemption is to avoid the sort of overbreadth concerns that plaintiffs otherwise voice.

implausible and contrary to the testimony of an expert and two experienced practitioners. *See* pp. 50. A period when airtime is particularly expensive and the airwaves are crowded with campaign ads is generally *not* the best time to address the public with issue messages that in fact have nothing to do with elections. If instead plaintiffs mean that broadcasting ads discussing issues *and referring to a candidate*, targeted to the candidate's electorate, at the time that voters are deciding whom to elect, best allows them to "influenc[e] the electoral issue climate" and "generat[e] popular pressure on candidates," because especially at that moment "electoral considerations motivate officeholders" (and their challengers), *see* AFL Br. 21, then they are simply restating the rationale for Title II.

b. *The Empirical Evidence.* Congress knew from Members' own experience that the vast majority of ads BCRA covers have an electioneering purpose or effect. It also considered empirical evidence, including studies by the Annenberg Public Policy Center (which plaintiffs have never contested), SA 652-57(K); Professor Magelby's study "Dictum Without Data," *see* 147 Cong. Rec. S252-53 (Apr. 2, 2001) (Sen. Thompson); and the CMAG database of political advertising, in the form of the 1998 and 2000 *Buying Time* studies much discussed below, *see* SA 1031-73(K), 1327-56(L), 238-48(H). Apart from an *ad hominem* attack (McConnell Br. 53 n.18), plaintiffs do not dispute that the CMAG data represent the most comprehensive body of research on political television advertising ever conducted.[53]

Indeed, plaintiffs do not challenge the vast majority of the findings based on the CMAG data—including the central findings, summarized above and in the opinions below, that: the extent of political advertising by interest groups grew

[53] With regard to plaintiffs' personal aspersions, we note only that Judge Leon, after carefully reviewing the matter, concluded that any interest the *Buying Time* authors had in campaign finance reform did not "skew[] the results" of their research, and that any "flaws and shortcomings ... do not detract from the studies' credibility and reliability." SA 1335; *see also* League of Women Voters Br. 18-29.

explosively during and after the 1996 election cycle; candidates and political parties, whose electioneering purposes are undisputed, do not use "express advocacy" in their ads; candidate-centered "issue" ads run by interest groups are overwhelmingly concentrated in the final weeks before elections; groups target such ads at close campaign races and in a partisan manner inconsistent with protestations that they mean to address *only* "issues"; and these patterns are different for ads that do *not* name candidates. *See, e.g.*, pp. 49-53; SA 678-708(K), 1315-26(L). These unchallenged findings, based entirely on objective data, refute plaintiffs' wishful assertion that the defense of Title II "relie[s] almost exclusively" on the single aspect of the empirical evidence that they attack. McConnell Br. 53.

Plaintiffs focus on one question in each *Buying Time* study, in which student coders were shown ads (out of the context in which they ran) and asked whether, in their view, "the purpose" of each ad reviewed was to provide information about or urge action on an issue, or to generate support for or opposition to a candidate. *Buying Time 1998* at 193 (Q. 6); *Buying Time 2000* at 99 (Q. 11). Responses to that question allowed researchers to estimate the percentage of issue-focused ads aired by interest groups over the whole year that BCRA would have covered, and the percentage of all interest group ads covered by BCRA that were classed by the student respondents as issue-focused rather than campaign-focused. The first test explores how much issue-focused speech over the course of an election year BCRA leaves completely unaffected, while the second seeks to get at how effective BCRA is in covering what it intends to cover. Defendants' expert witnesses estimated that of all airings of issue-focused ads by interest groups in the two election years studied, only 6.1% in 1998 and 3.1% in 2000 would have been treated as "electioneering communications." The estimated proportion of ads BCRA would have covered that were coded as issue-focused was 2.3% in 2000; 14.7% in 1998 (when there was no presidential election); and 3% for the two years combined. Krasno/Sorauf Rep., App. at

C (for 1998), 60 n.143; Goldstein Rep. 25 (for 2000) (JA 1383, 1342, 1179).

Although both plaintiffs and the opinions below discuss these particular figures at some length (*see, e.g.*, McConnell Br. 53-57), only four essential points need be made. First, experts defend the disputed subjective component of the empirical evidence as one instructive measure strongly suggesting that Title II "does a good job hitting what it is aiming at . . . and missing what it is not." Krasno/Sorauf Rep. 60-61 (JA 1343). Nonetheless, given all the *objective* evidence defining the problem of candidate-centered "issue" ads and demonstrating the tailoring of Congress's response, the subjective evidence is in no way essential. Indeed, the dispute over it supports Congress's decision to adopt an entirely objective definition of what constitutes "electioneering."

Second, Judge Leon based his overbreadth analysis in part on the misunderstanding that defendants' expert Dr. Goldstein "testified on cross examination that he had re-evaluated the results of the [2000] study . . . and concluded that, in fact, 17 percent" of ad airings that would have been covered by BCRA in 2000 "were genuine issue advocacy." SA 1157(L); *see* SA 767(K). As the amicus brief filed by the League of Women Voters demonstrates (24-25), it simply misreads the record to attribute to Dr. Goldstein a figure generated by plaintiffs, and only through an implausible re-coding of the underlying data.[54]

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[54] Briefly, the 2000 study included seven similar CBM ads. Student respondents originally coded six of them as campaign-focused and one as issue-focused. *See* Goldstein Rebuttal Rep. 16-17; Goldstein Cross 159, 216. During cross-examination, Dr. Goldstein explained that although all the ads should have been classified as electioneering, his report adopted the conservative approach of honoring the original, anomalous coding of the seventh ad. *See* Goldstein Cross 127, 159, 217-20. Plaintiffs' counsel demonstrated that if one instead treated all seven as "issue" ads, one could mathematically generate the 17% figure. *Id.* at 160-69. Dr. Goldstein never suggested that, given the actual original coding of the ads, that approach would make any sense. *See id.* at 216-20 (confirming he had "[no] doubt at all that these ads should be classified as electioneering").

Third, plaintiffs, who bear the burden of proving that Title II is so overbroad that it should be struck down on its face, produced no empirical evidence of their own. *See* SA 764, 856(K). Nor have they challenged *any* of the objective evidence put forward in support of Title II.

Fourth, and most important, whatever their real or imagined flaws, the subjective research results cannot demonstrate the *in*validity of Title II. They are based on questions that asked respondents to identify "the purpose" of each ad. Respondents were not allowed to answer "both." Yet, as both sides have emphasized, many if not most campaign ads—including ads run by candidates, and ads that use "express advocacy"—*also* discuss issues. Source and disclosure rules serve their purposes so long as *one* material purpose *or effect* of an ad is to influence a federal election. Thus, if the survey results presented by defendants' experts correctly identify the percentage of ads whose *principal* focus was electioneering, then they are strong evidence of extremely narrow tailoring. But even if some or all of plaintiffs' criticisms are correct, then whatever recomputation is justified would identify only a larger percentage of ads whose *principal* focus was on issues. Because ads with that focus might nonetheless have influencing elections as another material purpose or effect, such results would neither support plaintiffs' claim of overbreadth, nor undercut any of the record's other evidence of proper tailoring.

c. *Plaintiffs' Examples.* Finally, plaintiffs offer a few examples—presumably the best they could find—of ads they claim "powerfully illustrate[]" the overbreadth of Title II. McConnell Br. 50. Their examples are, indeed, telling.

One ad featured by the McConnell plaintiffs (Br. 51, 1a) complains about "Washington politicians," advocates term limits, points out that one candidate has "signed the pledge to limit her terms" but that the other "refused," and ends by urging viewers to "[c]all David Wu and tell him to sign" the pledge. What really "seem[s] unthinkable" (Br. 51) about this ad is that plaintiffs would seriously suggest that when broadcast in Wu's district, just before an election, it might

have had no electioneering purpose or effect. *See* p. 49 (discussing use of "call" or "tell" tag-lines).

The McConnell plaintiffs also feature (Br. 52, 3a) an ad run by the Michigan Chamber of Commerce naming Senate challenger Debbie Stabenow. The ad aired between September 20 and five days before the 2000 election. It says families risk losing their businesses "[b]ecause of the Death tax"; criticizes Stabenow for "vot[ing] twice against getting rid of the Death tax"; and asks viewers to "Call Debbie Stabenow" and "[t]ell her our working families need a break." It highlights past votes in the House, not an upcoming vote. A Chamber official acknowledged that voters "would negatively perceive" Stabenow in light of such ads, and that the reason for running them was that "she was in that time . . . a candidate for public office and we felt that the people of . . . Michigan needed" the ad as "necessary information" for their "decision-making process." LaBrant Dep. 34-35, 37. The "decision" in question was what Senator to elect.

We certainly agree with plaintiffs that this ad, and the others like it that are attached to the McConnell plaintiffs' brief, are "speech fully protected by the First Amendment." McConnell Br. 52. They also serve quite well to illustrate just the sort of obviously *campaign-focused* ads that interest groups were airing before BCRA—without complying with the FECA provisions meant to preclude groups like the Chamber of Commerce from using *treasury* funds to run *campaign* ads, and without disclosing to the public just who was funding the *campaign* activities of groups with names like "Coalition for the Future American Worker" (Br. 6a) or "Americans for Job Security" (Br. 12a).

There are a few examples of spot ads that may have been designed and run without any material electioneering purpose, despite naming candidates, reaching a targeted electorate, and running close to an election.[55] The AFL, for

[55] The ACLU submits (Br. 10-11) one example of an ad that it claims falls in this category. As Judge Kollar-Kotelly explained, this is the only

instance, ran two "cookie cutter" ads that targeted numerous Members of Congress, only some of whom were candidates. One urged opposition to granting China permanent most-favored-nation status. *See* McConnell Br. 51, 2a. Another alleged denial of benefits by HMOs, and criticized "Republicans in Washington" for "pushing an empty HMO proposal that won't stop these abuses." AFL Br. 6 ("Deny") (included in DEV 48, Tab 3 as "HMO Said No"). When targeted at incumbents not then running for reelection, these ads would not have been covered by BCRA. (The China ad, for example, would have triggered Title II in only two of fourteen market locations in which it ran. *See* Mitchell Dec., Ex. 1 at 92-93.) Where the target *was* a candidate, there is every reason to assume that the ads *did* have an electoral effect—and quite possibly some electoral purpose as well.

Plaintiffs make much of any uncertainty concerning actual electoral intent or effect in such marginal cases. Similarly, in their discussion of Title II's back-up definition (Br. 59-61), the McConnell plaintiffs argue that reasonable people could disagree about whether some ads "support or oppose" a candidate. Avoiding subjective judgments in individual cases is, of course, one principal reason Congress chose to enact an *objective* primary definition to define the coverage of Title II—a choice that honors this Court's emphasis on avoiding vagueness in regulations that touch on speech. But if one attempts such judgments, then as the AFL itself emphasizes (Br. 18), evaluation of the likely intent or effect of a particular ad requires consideration of the full context surrounding its use.[56] Accordingly, a court would need to have a

ad in the ACLU's history that satisfied Title II's criteria—and the ACLU *manufactured* it just so it could be a plaintiff in this case. SA 748-51.

[56] The ad "AAHP/Look Out for the Lawyers" (McConnell Br. 9a), for example, praises then-incumbent Senator Lauch Faircloth for "fighting to stop the trial lawyers," who "want[ed] Congress to pass new liability laws" that would "make trial lawyers richer" but "make healthcare unaffordable for millions." As Judge Kollar-Kotelly explains, in context, that ad clearly conveyed an electioneering message supporting Faircloth against his opponent, prominent trial lawyer John Edwards. SA 733-34.

more complete and focused picture of all relevant circumstances before concluding that applying source and disclosure rules to a particular ad like any of those cited by plaintiffs would be constitutionally invalid.

As this discussion underscores, Congress could have achieved greater precision of the sort plaintiffs profess to seek only by using a flexible statutory standard—one inevitably tied to more subjective factors, such as those that plaintiffs criticize in attacking the back-up definition. In effect, plaintiffs seek to create a legal dead zone in which Congress cannot, as a practical matter, avoid either facial overbreadth or facial vagueness. The Court should not tolerate that cynical contention. It would be an odd Constitution that theoretically allowed Congress to impose source and disclosure rules on independent campaign spending, but restricted it to means that have proven wholly ineffective.

Finally, the NRA refers to some of its 30-minute "infomercial" ads, in which some references to candidates might be deemed incidental. *See* Br. 37-43. (Among plaintiffs, only the NRA runs such ads. In a 30- or 60-second ad, *no* image or word is "incidental.") Understandably, it does not focus on any of its unabashedly partisan infomercials, such as the one that led with Charlton Heston's observation that "[t]his election could come down to battleground states," and continued with repeated references to Al Gore. *See* McQueen Dep. 113-30 (JA 960-70) (text of ad). Nor does it dwell on ads such as the two spots set out side-by-side at SA 695-96(K), one funded from the NRA's treasury and the other by its PAC. The difference? The PAC ad ends with "Vote George W. Bush for President," while the "issue" ad makes do with Charlton Heston observing—just before the 2000 election—that "the day of reckoning is at hand." *See also* SA 697(K). Whatever Title II's impact on the exceedingly small universe of 30-minute ads with truly incidental candidate references run just before elections, it cannot support a

claim that Title II is facially invalid as to all ads to which it applies.[57]

2. Title II Properly Reaches Nonprofit Corporations Unless They Qualify For An As-Applied Exemption under *MCFL*

The NRA and the ACLU argue that nonprofit, ideological corporations should not be treated like other corporations for purposes of campaign finance regulation. That argument is incorrect as a general matter, and this litigation is not the place for as-applied challenges by these plaintiffs.

To begin with, neither organization demonstrates that compliance with Title II would impose any great burden. The NRA claims that BCRA would reduce its members' "collective voice" to a "whisper" (Br. 25), but there is no reason that should be so—if, in fact, the members do support the group's *electoral* speech. Nothing prevents the NRA from reducing its membership dues by some amount, and asking its four million members to contribute that amount to its Political Victory Fund. In any event, during the 2000 election cycle, the PVF's own fundraising was already so successful that it used its own funds to pay for administrative expenses that could legally have been paid with NRA treasury funds. Adkins Cross 41-43. The ACLU, meanwhile, complains principally (Br. 17) that it does not want to set up a segregated fund to comply with BCRA, because it "is not a partisan organization and does not choose to present itself as one." It never explains why there is any "presentation" issue. FECA does not require that segregated funds adopt a partisan name, make political contributions, or engage in partisan conduct. No one need misunderstand the purposes of the "ACLU Election-Period Non-Partisan Legislative Advocacy Fund."

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[57] The NRA also argues (Br. 38-41) that it uses broadcast advertising to respond to public attacks and raise funds. It does not demonstrate that these efforts would be materially impeded by complying with Title II, or explain why such ads would not raise source and disclosure concerns if they name candidates and run in their districts just before elections.

In contrast to these imagined burdens, the risks posed by an "issue" advocacy exemption for nonprofits are very real. This Court has expressly recognized that the basic reasons for limiting corporate and union campaign spending to segregated funds apply to ideological nonprofits—specifically including the NRA. *Beaumont*, 123 S. Ct. at 2209-10. Such organizations, "like their for-profit counterparts, benefit from significant 'state-created advantages,'" and their fundraising and political prowess "show that 'political "war chests'" may be amassed simply from member contributions." *Id.* at 2209 & n.6. If exempt from source and disclosure rules, they could quickly become easy-to-use, hard-to-police conduits for unlimited campaign spending by unions and for-profit corporations. *Id.* at 2209-10; *Austin*, 494 U.S. at 664; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (*MCFL*) (nonprofits could "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace"). And individuals who support a nonprofit's basic mission—or join because membership provides various benefits—do not necessarily want their funds to be used to support or oppose candidates. *See Beaumont*, 123 S. Ct. at 2209 n.5. BCRA's coverage of nonprofits is not only reasonable, but indispensable.

As the NRA emphasizes (Br. 28-33), BCRA contains superseded provisions that would have required simply that nonprofit corporations pay for electioneering communications only out of funds contributed by individuals. *See* 2 U.S.C. §§ 434(f)(2)(E)-(F), 441b(c)(2), *superseded by* 2 U.S.C. § 441b(c)(6). That approach would have been significantly more complicated to administer and enforce—and significantly less effective. Money is fungible, so corporate or union contributions could be used to fund *all* the organization's non-campaign activities, freeing individual contributions for electioneering communications. *See Beaumont*, 123 S. Ct. at 2210 n.7 (rejecting argument that "earmarking" rules adequately addressed conduit problem in contribution context).

As to any argument that specific organizations should not be subject to Title II, *MCFL* already establishes that restrictions on the use of treasury funds cannot be applied to

certain nonprofits. *MCFL* and the FEC's regulations establish the basic criteria for exemption—including that the corporation engage in no "business activities," not be "established by a business corporation or a labor union," and have "a policy not to accept contributions from such entities." 479 U.S. at 264; *see* 11 C.F.R. § 114.10(c), (d) (recognizing that Title II is subject to the same as-applied exemption under *MCFL*). Later decisions reaffirm, however, both that *MCFL*'s requirements are to be strictly construed, and that FECA's requirements may properly be applied to most "nonprofit ideological corporations." *See Austin*, 494 U.S. at 661-65; *Beaumont*, 123 S. Ct. at 2204, 2207-11.

These requirements suggest that neither the NRA nor the ACLU is entitled to a constitutional exemption, because each accepts corporate funding.[58] More fundamentally, given *MCFL* and *Austin*, BCRA's electioneering communications provisions may not be challenged on their face on the ground that *some* nonprofit corporations might be entitled to an as-applied exemption. After all, *MCFL*, which *upheld* such a challenge, did not therefore invalidate the application of FECA's source restrictions to all corporations. A corporation that believes it falls within *MCFL*, or that the *MCFL* exemption should be expanded, may pursue that claim on an as-applied basis, before the FEC and then in the courts. Whatever the merits of such arguments, they are out of place in this case.

CONCLUSION

BCRA should be sustained in its entirety.

Respectfully submitted,

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[58] Each argues that its corporate funding is comparatively modest—which suggests that neither would be terribly burdened by forgoing corporate donations to qualify for an exemption. *See* SA 834 n.123(K). But the absolute amounts involved—$85,000 for the ACLU (Br. 9 n.8, 17), and $385,000 for the NRA (Br. 3)—are not trivial, and could quickly increase if the organizations became conduits for corporate or labor electioneering.

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AUGUST 2003

CMR

Ad Detector

BRAND:	GORE FOR PRESIDENT+
TITLE:	NA/Cheney Myanmar
COMMERCIAL:	NA/Cheney Myanmar
LENGTH:	30
FRAMES:	7

CMAG REPORTS

[Announcer]: On October 27th, The Wall Street Journal reported that a brutal military regime

in Myanmar, formerly known as Burma, forced men, women, and children

into slave labor to assist the building of an oil pipeline by American company

Haliburton. The president of Haliburton at the time, Dick Cheney. The

question is: Did Dick Cheney really know nothing or did he know and

did nothing? Either way, we just can't trust Dick Cheney

a heartbeat away from the presidency.

BEST AVAILABLE COPY

CMR

Ad Detector

BRAND: [illegible]

TITLE: WA/AJS Judge Cantwell By Her Record

COMMERCIAL: WA/AJS Judge Cantwell By Her Record 1 of 1

LENGTH: 30

FRAMES: 7

CMAG REPORTS

[Announcer]: You can judge a person by her past performance. Look at Maria Cantwell's record.

Cantwell voted to raise the gas tax, hike property taxes, and expand

the sales tax. Cantwell even voted to raise tax rates on

Social Security by 70%. [Cantwell]: "I'm actually proud of my

1993 vote because I think that that vote was the right decision." [Announcer]: Maria Cantwell

voted to raise fees and taxes over fifty times. So she must be very

proud indeed. Can we afford politicians like Maria Cantwell? [PFF Americans for Job Security]

CMR

Ad Detector

BRAND: GORE FOR PRESIDENT

TITLE: AFLCIO/Bush Debates PBR

COMMERCIAL: AFLCIO/Bush Debates PBR

LENGTH: 30

FRAMES: 7

CMAG REPORTS

[Inglis]: " When Governor Bush said during the debate that he brought people together to

pass the patient's bill of rights, he knew in his heart that

that was absolutely false. Nurses

worked long and hard to pass this legislation and hold

the HMOs accountable for denying medical care to people. He fought

it every step of the way. His constituency was

the insurance companies. That's why he vetoed it." [PFB: The Working Men and Women of the AFL-CIO]

CMR

Ad Detector

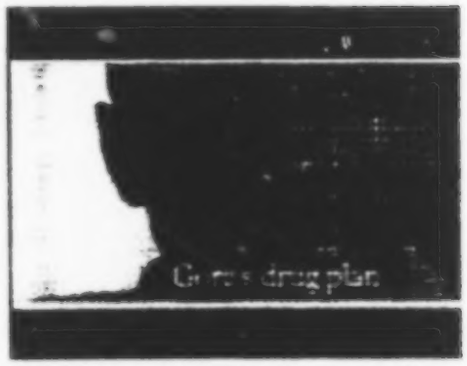
BRAND:	BUSH FOR PRESIDENT+
TITLE:	AJS/Bush Think Hard Rx
COMMERCIAL:	AJS/Bush Think Hard Rx
LENGTH:	30
FRAMES:	8

1 of 1

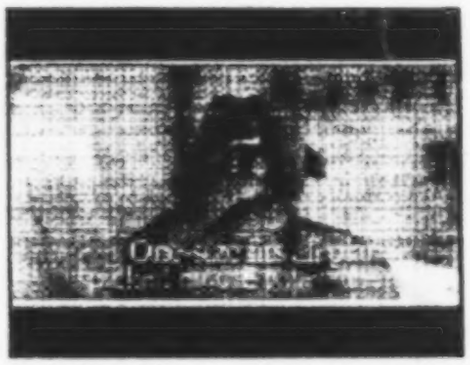
CMAG REPORTS

[Announcer]: Think hard about what your healthcare and prescription drugs would be like under Al Gore. One in four seniors

could lose their good private coverage. Just one chance to join Gore's

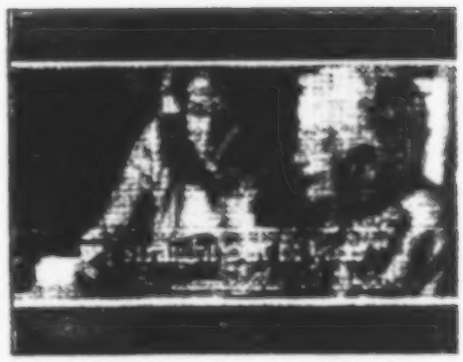


drug plan or be left out forever. A one size fits all plan



picked by the government where bureaucrats would end up deciding what medicines

you can get. And you'd pay up to $600 a year more straight out of



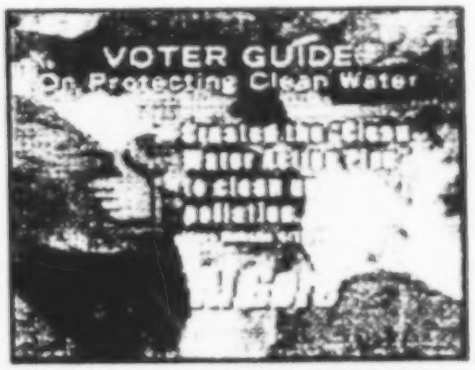
your Social Security check for the privilege. So think hard America.

[PFB: Americans for Job Security]

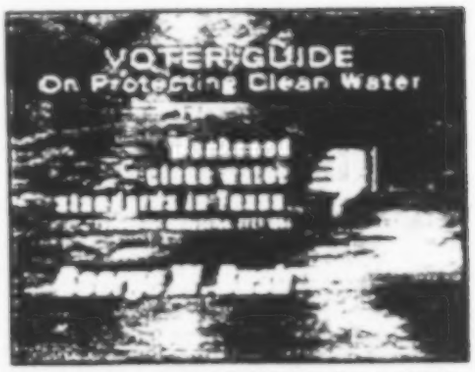
Campaign Media Analysis Group
703-683-7110
www.politicsontv.com

BEST AVAILABLE COPY

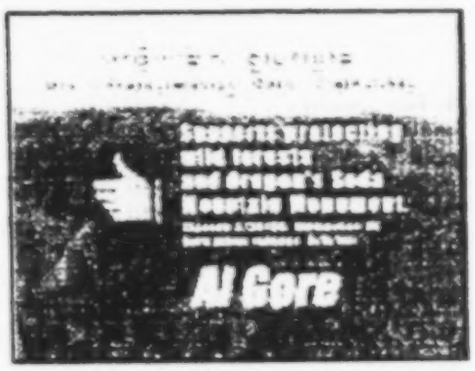
[Announcer]: Two candidates for President are world's apart when it comes to protecting Oregon's environment. Al Gore



created the Clean Water Action Plan to clean up pollution. George Bush weakened



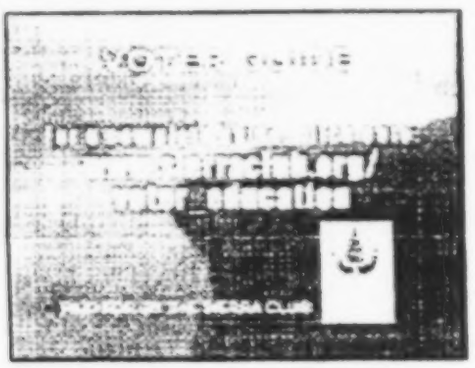
clean water standards for rivers and lakes in Texas. Al Gore



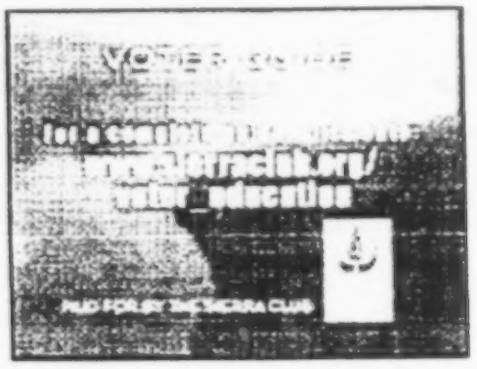
supports protecting wild forests and Oregon's Soda Mountain Monument.

George Bush would double logging in our national forests.

Still think there's no difference between Al Gore and George Bush? Click on the Sierra Club's



complete voter guide. [PFB: The Sierra Club]



CMR

Ad Detector

BRAND: AFL-CIO UNION+
TITLE: AFLCIO/MI Who is Abraham Working For
COMMERCIAL: AFLCIO/MI Who is Abraham Working For 1 of 1
LENGTH: 30
FRAMES: 7

CMAG REPORTS

[Announcer]: Who was Spence Abraham working for when he voted three times against the minimum wage

increase with no strings attached? When he voted to allow corporations

to deny workers overtime pay even if they work up to 80 hours a week?

When he voted to block federal safety standards aimed

at protecting workers on the job? Was Abraham working for you or

his friends in big business. Tell Spence Abraham when he votes against our wages and our safety, he's not working

for Michigan's working families. [PFB: Working Men and Women of the AFL-CIO]

[Announcer]: Ric Keller has become an embarrassment. He claims to be a conservative but got caught getting help from liberal Democrat Linda

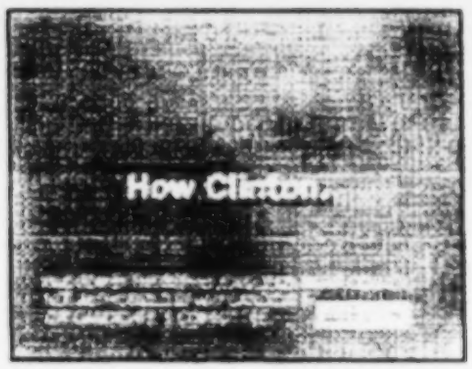
Chapin, and Keller's law firm coughed up campaign contributions for

liberal Democrat Buddy McKay. Ric Keller even supported

the Clinton-Gore billion dollar tax on food. Ric Keller, who

proclaims to be a conservative but gets caught acting like a liberal.

How embarrassing. How wrong Hov Clinton.



(PFB: Republican Leadership Council)

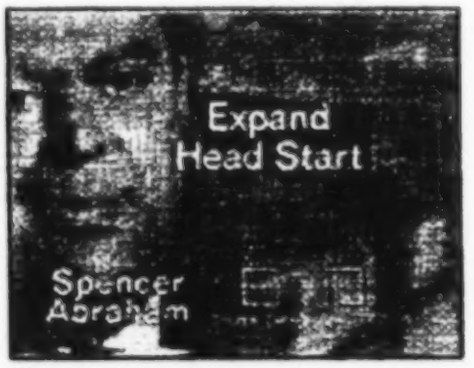
CMR

Ad Detector

BRAND:	POL-US SENATE+	
TITLE:	MI/MIWV Abraham Failed MI Children	
COMMERCIAL:	MI/MIWV Abraham Failed MI Children	1 of 1
LENGTH:	30	
FRAMES:	8	

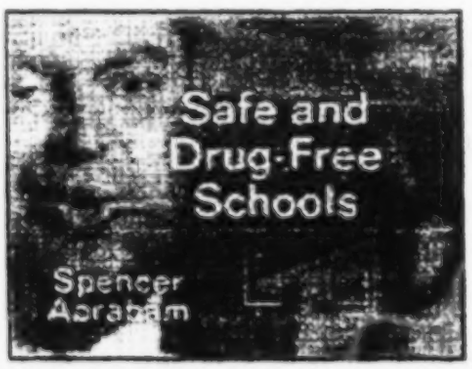
CMAG REPORTS

[Announcer1]: When it comes to education, Spencer Abraham has failed Michigan's children. [Announcer2]: Expand Head Start:

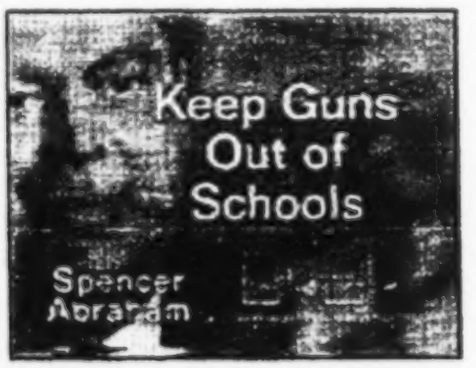


Abraham voted against it. [Announcer1]: Hire new teachers to reduce class size:

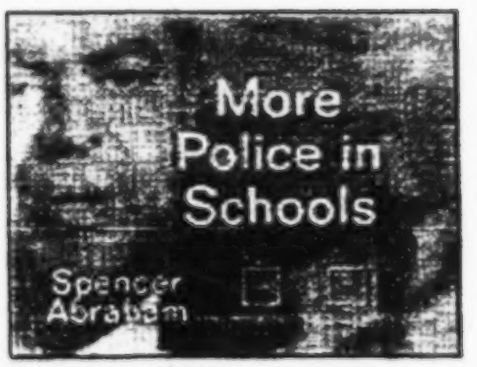
Abraham voted no. [Announcer2]: Safer and drug-free schools: Abraham voted to eliminate



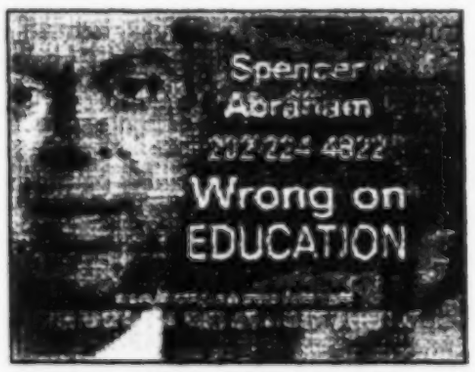
a program that protects kids. [Announcer1]: A law against guns in school:



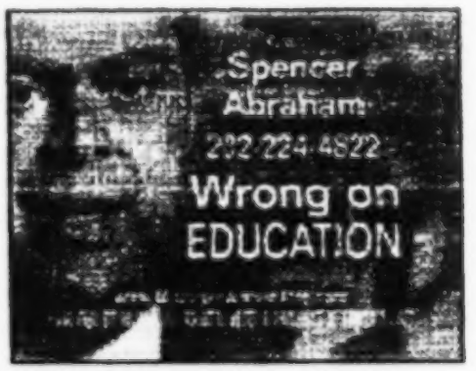
Abraham actually opposed it. [Announcer2]: Put more police in local schools:



Once again Abraham voted no. [Announcer1]: Tell Spencer Abraham his record on education is



wrong for Michigan families.



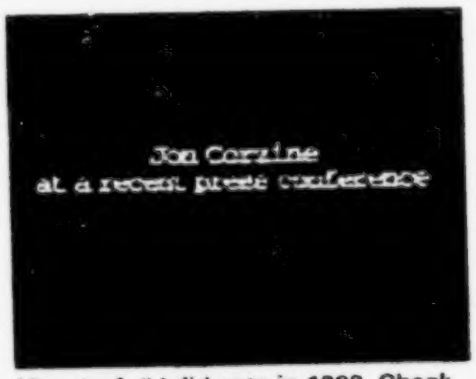
[PFB: Michigan Women Voters. A Project of Emily's List]

CMR

Ad Detector

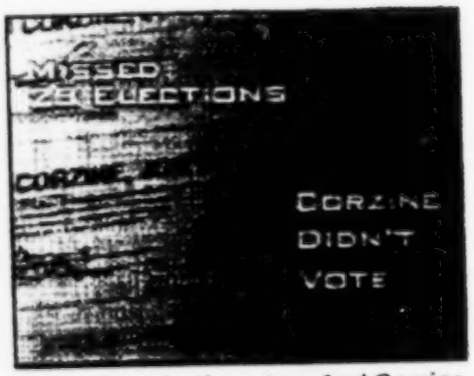
BRAND: CITIZENS/BETTER AMERICA+
TITLE: NJ/CBA Corzine Didn't Vote in 1998
COMMERCIAL: NJ/CBA Corzine Didn't Vote in 1998 1 of 1
LENGTH: 30
FRAMES: 8

CMAG REPORTS

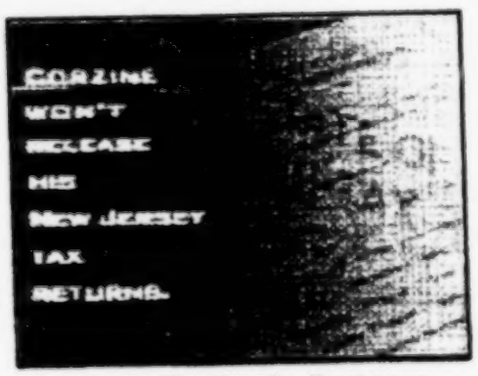


[Corzine]: " I did vote in 1998. Check the record."

[Announcer]: We did check and he didnt' vote and Corzine missed voting



in 23 other elections too. And Corzine won't release his New Jersey

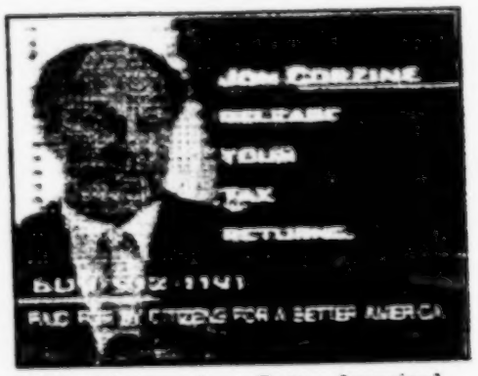


tax returns. The Courier-Post says, "..it's all part of a pattern

of deception and being rich doesn't excuse him from being accountable."

The Star Ledger calls it "needless secrecy." We agree.

Jon Corzine: Release your tax returns and always tell the truth.



[PFB: Citizens for a Better America]

CMR

Ad Detector

BRAND:	POL-CONGRESS+
TITLE:	MI/MICA Bonior Let Criminals Free
COMMERCIAL:	MI/MICA Bonior Let Criminals Free 1 of 1
LENGTH:	30
FRAMES:	7

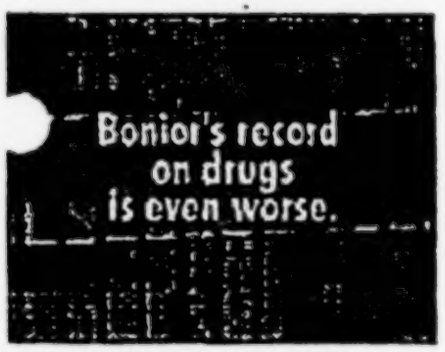
1043

A00SOV7H.ESB

[Announcer]: The Daily reports criminals are being set free into our neighborhoods. In May, Congressman

David Bonior voted to allow judges to let violent criminals out of jail.

Rapists, drug dealers, and even muderers. But that's not all. Bonior's



record on drugs is even worse. Bonior voted to reduce the penalties

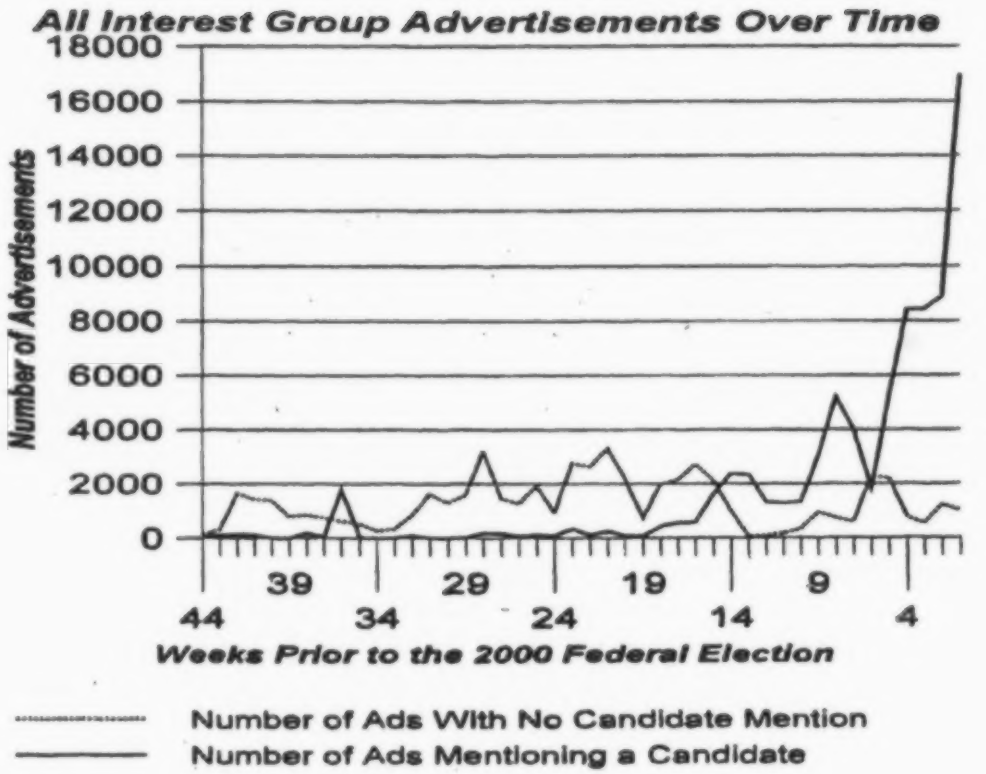
for crack cocaine. And in April, David Bonior voted to use your tax dollars

to give free needles to illegal drug users. Call Bonior.

Tell him he's wrong. Dangerous criminals belong in jail.

BRE 01257

APPENDIX B



Reprinted from SA 848 (Kollar-Kotelly)

APPENDIX C

LEGISLATIVE HISTORY EXCERPTS

Statements by Congressional Sponsors

Statement of Sen. Snowe: "We also must close off the use of corporate and union treasury money used to fund ads influencing Federal elections. . . . What we are talking about are broadcast advertisements that are influencing our Federal elections and, in virtually every instance, are designed to influence our Federal elections. Every focus group and every study group that has been conducted over the last few years proves this, and I'll detail those studies later. And yet, no disclosure is required and there are none of the funding source prohibitions that for decades have been placed on other forms of campaigning. Why is this so? Because they don't contain the so-called 'magic words' like 'vote for candidate x' or 'vote against candidate x' that make a communication what is called 'express advocacy,' and therefore, subject to Federal law requiring disclosure and requiring that the ad be paid for with hard money. . . . It's time we closed this loophole. It's time to remove the cloak of anonymity. Otherwise, we are saying that it really doesn't matter to the election process. That we should not know who is behind these types of commercials that are run 60 days before the election, 30 days before a primary, whose donors contribute more than $1,000. We ought to have disclosure on these ads where there currently is no disclosure. And that's what the Snowe-Jeffords provision in this bill does, in simple, straightforward and unambiguous terms. . . . [I]t prohibits the use of union or corporate treasury money to pay for these ads, in keeping with longstanding provisions of law. Corporations have been banned from direct involvement in campaigns since the Tillman Act of 1907. Unions were first addressed in the Smith-Connally Act of 1943 and the prohibition was finally made permanent in 1947 with the Taft-Hartley Act. And these laws have stood because the Court has recognized—as recently as 1990 as this quote from Jus-

tice Marshall in the Austin versus Michigan Chamber of Commerce decision shows—'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form, and that have little or no correlation to the public's support for the corporation's political ideas.'" 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002).

Statement of Sen. Jeffords: "I am especially proud of the provisions in this legislation that reform the law concerning broadcast advertisements near an election that escape even minimal disclosure by not using the 'magic words.' These electioneering communications are cleverly and clearly seen by the electorate to be trying to influence their vote, but the true nature of the sponsors and funding for these advertisements remain cloaked in the veil of secrecy. The American public deserves to know who is trying to influence their vote, and the Snowe-Jeffords provisions will provide them this necessary information." 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002).

Statement of Sen. McCain: "Federal election law has long barred unions and corporations from making expenditures in connection with federal elections. However, by sponsoring their own putative 'issue ads,' they circumvent this law. The Snowe-Jeffords electioneering communications provision will help restore the original intent of the law: to keep a tidal wave of union and corporate money out of Federal elections. . . . [Parties and outside groups] evade campaign finance laws prohibiting the use of soft money on campaign ads by studiously avoiding the use of the so-called 'magic words' of 'vote for' or 'vote against' in such ads. But these soft money-funded ads are nonetheless patently campaign ads. Indeed, 97 percent of the electioneering ads reviewed as part of the Brennan Center's 'Buying Time 2000' study did not use 'magic words.' . . . The sham issue ad subterfuge—permitting outside groups to spend supposedly prohibited soft money on campaign ads without disclosing even a dime of that spending—will continue unless Congress draws a more accurate line between campaign ads and issue

ads. Clearly, even a casual observer would concede that 'magic words' is a dramatically underinclusive test for determining what constitutes a campaign ad. This bill would simply subject soft money-funded campaign ads that masquerade as issue discussion to the same laws that have long governed campaign ads." 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002).

Statement of Sen. Feingold: "I believe [Snowe-Jeffords] is an extremely valuable addition to the bill. It is the second big loophole in the system. No. 1 is the soft money loophole. No. 2 is the phony issue ads. Snowe-Jeffords gets at the heart of the issue ad loophole. Right now wealthy interests are abusing this loophole at a record pace. They are flouting the spirit of the law, there is no question about it. They advocate for the election or defeat of a candidate, even though they don't say those 'magic words,' such as 'vote for,' 'vote against,' 'elect' or 'defeat.' These ads might side-step the law, Mr. President, but they certainly don't fool the public." 147 Cong. Rec. S3070 (daily ed. Mar. 29, 2001).

Statement of Sen. Snowe: "At the same time we address the soft money issue, I also think it is critical that we address the ever burgeoning segment of electioneering popularly known as sham issue advertising. We do so in a way carefully constructed as to pass constitutional muster. I am speaking of advertisements influencing the Federal elections in this country but [that] get off scot-free when it comes to any degree of disclosure or any degree of prohibitions normally associated with campaigning. Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws." 147 Cong. Rec. S2455 (daily ed. Mar. 19, 2001).

Statement of Sen. Feingold: "Mr. President, this bill also includes the amendment dealing with abuses of 'issue advocacy' . . . . The Snowe-Jeffords amendment is a balanced approach to the 'phony issue ad' problem that prohibits corporations and unions from purchasing television and radio advertisements within the last 2 months of a campaign if those ads refer to a clearly identified candidate. It is designed to prevent corporate and union treasury money, which has been banned from federal elections since early in this century, from making its way back into the elections in the form of advertisements that pretend to be about issues, but instead are about elections. Advocacy groups, on the other hand, are permitted to purchase what the bill calls 'electioneering communications,' as long as they disclose their expenditures and the major donors to the effort and take steps to prevent the use of corporate and union treasury money for the ads. Mr. President, we worked long and hard to perfect this amendment last year, to make sure that it is constitutional, and that it will be effective in combating what has become a very serious subterfuge engaged in by entities that plainly want to influence elections but don't want to abide by the election laws. It is a crucial piece of the campaign finance reform puzzle, and we are proud to have the support of Senators Snowe and Jeffords for our effort and to include their proposal in our bill." 145 Cong. Rec. S423 (daily ed. Jan. 19, 1999).

Statement of Sen. Feingold: "We firmly believe that [the Snowe-Jeffords amendment] will withstand constitutional scrutiny because corporations and unions have for a very long time been barred from spending money directly on Federal elections. The Senator from Kentucky suggested we lack case law for these propositions, but the Supreme Court upheld the ban on corporate spending in the *Austin* v. *Michigan Chamber of Commerce* case. Mr. President, it is noted that a Michigan regulation that prohibited corporations from making independent expenditures from treasury funds prevented 'corruption in the public arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' According to the Court, the Michigan regulation 'ensured that the expen-

ditures reflect actual public support for the political ideas espoused by the corporations.'" 144 Cong. Rec. S984 (daily ed. Feb. 25, 1998) (italics added).

Statement of Sen. Jeffords: "Corporations have been banned from electioneering since 1907; unions, since 1947. As the Supreme Court pointed out in *United States* v. *UAW*, Congress banned corporate and union contributions in order to 'avoid the deleterious influences on Federal elections resulting from the use of money by those who exercise control over large aggregations of capital.' Our amendment would ban corporations and unions from using General Treasury funds to fund electioneering communications in the last 60 days of the general election and the last 30 days before a primary." 144 Cong. Rec. S974 (daily ed. Feb. 25, 1998).

Statements by Other Members of Congress

Statement of Rep. Serrano: "The influence of money in American politics is a problem as old as the Nation. It is discouraging to remember that the broken campaign finance system that Shays-Meehan would replace was itself once seen as a reform, designed to limit undue influence by large unregulated and undisclosed campaign contributions, but that big money soon found its way around the reforms through soft money and 'independent' advertising.... Campaign advertisements masquerading as issue advocacy must be regulated. Shays-Meehan will require that broadcast communications that mention a Federal candidate must be paid for with hard money—which includes corporate and union PAC funds—within 60 days of a general or 30 days of a primary election." 148 Cong. Rec. H347 (daily ed. Feb. 13, 2002).

Statement of Rep. Cardin: "The bill would close two large loopholes in the law that contribute to the corruption of our political system. One loophole is so-called 'soft money' contributions, which are unregulated and unlimited contributions from wealthy special interest groups. Another major loophole deals with 'independent' issue advertisements,

which allow special interests to seek to influence the outcome of an election campaign by spending large sums of money on advertising campaigns. Currently, these ads which are clearly aimed at influencing an election can be worded in a way that they are deemed issue advocacy and are not subject to campaign spending limits or disclosure requirements." 148 Cong. Rec. H387 (daily ed. Feb. 13, 2002).

Statement of Rep. Kleczka: "An equally troubling aspect of today's campaign system is the number of issue advertisements broadcast on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law." 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002).

Statement of Rep. Nadler: "[Y]ou said that of course incumbent politicians, many of them, some of them don't want to be criticized, so therefore there is an attempt to restrict the speech.... But isn't it the case that really this has nothing to do with criticism? This bill is not saying you can't criticize the Congressman, or whatever; the bill is saying if you want to criticize the Congressman, one, do it with hard money and subject to the other—basically with hard money disclosure; and two, by implication, be honest about it.... Isn't the issue really not that you can't criticize, but that if you want to criticize you can't do it with multimillion-dollar contributions?" *Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 151, 1st Sess. (2001).

Statement of Sen. Edwards: "We now know empirically in the case of the 2000 election, 99 percent of those ads covered by Snowe-Jeffords are campaign ads and not issue ads. They are sham issue ads. They are a fraud under the campaign election laws that exist in this country. Snowe-Jeffords is trying to eliminate that fraud, eliminate that sham." 147 Cong. Rec. S3040 (daily ed. Mar. 28, 2001).

Statement of Sen. Edwards: "In fact, [sham issue ads] are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country.... The Court has already held that what we are doing in these sham issue ads and with soft money is a compelling State interest because of the need to avoid corruption or, more importantly, in this case, the appearance of corruption." 147 Cong. Rec. S2636 (daily ed. Mar. 21, 2001).

Statement of Sen. Dodd: "The McCain-Feingold legislation ... does address two of the most pressing deficiencies in our system of campaign finance: Undisclosed soft money contributions, and sham issue ads.... This special interest speech—paid for with unlimited, undisclosed soft money—creates, at a minimum, the appearance of undue influence, if not an implied quid pro quo by the contributor." 147 Cong. Rec. S2435-36 (daily ed. Mar. 19, 2001).

Statement of Sen. Dodd: "[A] majority in the Congress and a majority of the American people firmly believe that massive amounts of unregulated money pouring into political campaigns is corrupting our system of elections in this country. That perception threatens to undermine the very authority of government and will erode, in my view, the confidence in our system of democracy.... Nowhere is this potential for cynicism greater than in the use of electioneering messages masquerading as 'sham issue' ads." *The Constitution and Campaign Reform: Hearings before the Comm. on Rules and Admin.* 106th Cong. 636, 2d Sess. (2000).

Statement of Sen. Kennedy: "The House reforms also ended other serious abuses in campaign financing. It ends the sham of the so-called issue ads loophole, which permits special interests to spend big money on campaign advertising obviously designed to support a candidate, as long as the ads do not specifically call for the candidate's election. The House bill treats these ads as the campaign ads they really are, and rightly subjects them to regulation under the campaign finance laws." 145 Cong. Rec. S12741 (daily ed. Oct. 18, 1999).

Statement of Sen. Feinstein: "Banning soft money without addressing issue advocacy will simply redirect the flow of undisclosed money in campaigns. Instead of giving soft money to political parties, the same dollars will be turned into 'independent' ads. The issues of soft money ban and independent advertisements go hand in hand one can not be addressed without the other.... This campaign loophole [regarding issue advocacy] allows unions, corporations, and wealthy individuals to influence elections without being subject to disclosure or expenditure restrictions." 145 Cong. Rec. S12661-62 (daily ed. Oct. 15, 1999).

Statement of Rep. Borski: "Soft money is used to finance the second loophole in campaign finance law; sham issue advertisements. This loophole allows special interests to spend huge sums of money on campaign ads advocating either the defeat or election of a candidate. As long as these ads do not use the magic words 'vote for' or 'vote against' they are deemed 'issue advocacy' under current law and therefore not subject to campaign spending limits or disclosure requirements. In an effort to ban campaign advertisements that masquerade [a]s 'issue advocacy,' Shays-Meehan tightens the definition of 'express advocacy' communications. Under the bill, any ad that is clearly designed to influence an election is deemed 'express advocacy' and must therefore abide by federal contribution and expenditure limits and disclosure requirements." 145 Cong. Rec. H1888 (daily ed. Sept. 15, 1999).

Statement of Rep. Blunt: "Mr. Chairman, the Meehan-Shays substitute bans soft money, and then what we also do is we recognize that the sham issue ads are truly campaign ads, and that is the key point. They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such. One of our provisions is obviously already in existing law. Vote for or vote against; it makes it a campaign ad. And

people get around the sham issue ads by not saying vote for or vote against, but they might as well based on what they say." 144 Cong. Rec. H6802 (daily ed. July 30, 1998).

Statement of Sen. Glenn: "Together, the soft-money and issue-advocacy loopholes have eviscerated the contribution limits and disclosure requirements in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system. By inviting corruption of the electoral process, they threaten our democracy. If these and other systemic problems are not solved, the abuses witnessed by the American people in 1996 will be repeated in future election cycles.... The McCain-Feingold legislation that we are considering here today goes a long way to address these abuses. [The bill] brings 'issue advertising' funded by corporate and union interests within the campaign finance system." 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998).

Statement of Sen. Glenn: "The [Thompson Government Affairs] Committee's investigation also showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless. The result has been that millions of dollars, which otherwise would have been kept out of the election process, were infused into campaigns obliquely, surreptitiously, and possibly at times illegally." 144 Cong. Rec. S1048 (daily ed. Feb. 26, 1998).

Statement of Sen. Bryan: "Independent expenditure ads are one of the very reasons the campaign system is out of control. We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy." 144 Cong. Rec. S1038-39 (daily ed. Feb. 26, 1998).

Statement of Sen. Kerry: "The ads which are the targets of this legislation are ads paid for with union and corporate soft money, and which clearly identify candidates and are aired close to the election, despite the phony claim that they are

'issue ads.' If we were simply to ban soft money contributions to the parties, the soft money expenditures made by Labor and corporations would increase exponentially...." 144 Cong. Rec. S1039-40 (daily ed. Feb. 26, 1998).

Statement of Sen. Glenn: "It is beyond question that raising soft money and broadcasting issue ads are not, in themselves, unlawful. The evidence suggests that much of what the parties and candidates did during the 1996 elections was within the letter of the law. But no one can seriously argue that it is consistent with the spirit of the campaign finance laws for parties to accept contributions of hundreds of thousands—even millions—of dollars, or for corporations, unions and others to air candidate attack ads without being required to meet any of the federal election law requirements for contribution limits and public disclosure." 144 Cong. Rec. S1048 (daily ed. Feb. 26, 1998).

Statement of Sen. Lieberman: "Soft money, issue ads, which are clearly ads for or against candidates have been used to evade those clearly constitutional restrictions on contributions to political campaigns.... The current ability of parties and outside groups to disguise candidate-focused electioneering ads as issue ads undermines these longstanding and important Federal elections policies." 144 Cong. Rec. S993 (daily ed. Feb. 25, 1998).

Statement of Sen. Dorgan: "A political ad [from outside interest groups], paid for with soft money from a political Swiss bank account. It's like a Swiss bank account because it is from a secret source, designed to be used to create attack ads, to be used at election time to influence Federal elections, something that, frankly, is supposed to be prohibited by law. But this has now become the legalized form of cheating. In fact, we are not even sure it is legal, but it is being done all across this country and it is being done with big chunks of secret money. In fact, one secret donor put up, I'm told, $700,000 to spend on so-called issue ads to influence federal campaigns. We don't even know for certain the identity of that person. And that soft money, that big chunk of

money prohibited from ever affecting Federal races was used in this kind of advertising to directly try and influence Federal campaigns." 144 Cong. Rec. S881 (daily ed. Feb. 24, 1998).

Statement of Sen. Dorgan: "[Running sham issue ads] was done, by the way, with a legal form of cheating made possible by today's campaign finance law and current court decisions permitting issue ads, not so thinly disguised, to be waged in unlimited quantity using unlimited corporate money, unlimited individual money and undisclosed so that no one, no one in this country, will discover where the money came from. That is wha' is wrong with this current system." 144 Cong. Rec. S805 (daily ed. Feb. 23, 1998).

Statement of Sen. Collins: "Mr. President, the situation I have described [regarding "issue" ads run by the AFL-CIO] has led to the biggest sham in American politics. Nobody in Maine believed that the AFL[-]CIO's negative ads were for any purpose other than the defeat of a candidate. Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections. The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham." 143 Cong. Rec. S10125 (daily ed. Sept. 29, 1997).

Statement of Rep. Johnson: "The Hutchinson bill fails to address one of the most serious loopholes in our campaign finance system, the so-called sham issue ads. In recent elections we have watched special interest money exploit this loophole by pouring millions of dollars into campaign ads in elections all over the country.... Shays-Meehan clamps down on this loophole by requiring these outside groups to play by the same rules as everyone else." 144 Cong. Rec. H7325 (daily ed. Aug. 6, 1997).

Congressional Reports

"The Shays-Meehan bill also would provide a reasonable solution to the problem of unlimited and disclosed advertising

that fails to qualify as 'express advocacy' under federal election law, even though it is clearly designed to influence the outcome of an election.... Both political parties, as well as a wide range of interest groups and entities whose origin and purpose remain largely a mystery, have exploited issue advocacy in recent elections to run ads that clearly are designed to advocate the election or defeat of specific federal candidates, but evade federal election regulations by avoiding the 'magic words.'" *Bipartisan Campaign Reform Act of 2001: Committee on House Administration; Adverse Report*, H.R. Rep. No. 107-131, pt. 1, at 50 (2001).

"The evidence collected by this Committee showed clearly that there were really two campaigns conducted during the 1995/96 cycle. There was an 'overt' campaign and a 'covert' campaign.... In the 'overt' campaign, all contributors—whether they were individual donors or political action committees—revealed their names, their occupations, and the size of their donations to the Federal Election Commission. All donors to specific candidates were subject to strict limits on how much they could give.... In the 'covert' campaign, the rules were utterly different. In this parallel campaign, there was no disclosure and there were no limits on how much money would be distributed. *Tax-exempt 'issue advocacy' groups and other conduits were systematically used to circumvent the federal campaign finance laws....* Although the secret donors in the covert campaign were invisible, they had a powerful impact. These anonymous contributors poured millions of dollars into House, Senate, and presidential campaigns. In many cases, the secret donors financed massive advertising blitzes in the closing weeks of the campaign—boosting certain candidates and undermining their opponents. There is every reason to believe that these de facto campaign contributions determined the outcome of some of the close races.... *The secret flows of money used to pay for these attack campaigns severely undermine our campaign finance laws and corrupt the electoral process.*" Thompson Rep. at 5983-84 (minority views) (emphasis added).

"Corporations, unions and other independent groups are legally permitted to participate in federal election activity if they comply with federal requirements for contribution limits and disclosure. The complaint with these groups in the 1996 election cycle is that they sought to affect election outcomes, while evading the contribution limits and disclosure requirements that apply to other entities engaged in campaign activities. It is this evasion of the law, and the resulting erosion of public confidence in the federal campaign finance system, that has made the election activities of independent groups such a serious concern." Thompson Rep. at 5928 (minority views).

"One of the striking differences between the 1996 elections and prior elections was the prominent role played by so-called 'independent groups' that were not registered with the Federal Election Commission as political organizations. Typically, these groups ran campaign ads under the guise of 'issue advocacy.' By operating in that fashion, they were able to circumvent federal restrictions on campaign financing.... A significant number of nonprofit organizations that claimed to be nonpartisan played an active role in the 1996 elections, spending millions of dollars on behalf of political parties or specific candidates. These groups were not registered with the Federal Election Commission as political organizations and most of them claimed to be 'social welfare' or charitable organizations, registered with the Internal Revenue Service as either 501(c)(4) or 501(c)(3) tax-exempt entities." Thomp. Rep. at 5967 (minority views).

"Issue advocacy is the second most significant loophole. As long as ads avoid using 'express advocacy' terms like 'elect' and 'defeat,' the advertisers have been able to argue successfully that they are not running campaign ads—even if the ads are obviously intended to benefit special candidates. When an ad falls into the 'issue advocacy' category, the campaign finance laws do not apply: Virtually anyone can contribute money to independent groups to pay for such ads, there are no limits on how much money a donor can give, and there is no disclosure of the donor's identity. Thus, many

organizations that run 'issue ads' are not required to or do not register with the Federal Election Commission as political organizations, despite running television ads attacking candidates, conducting mail and telephone operations targeting voters, and spending millions of dollars on activities which affect election outcomes." Thompson Rep. at 5968 (minority views).

"In fact, the Committee has found that millions of dollars channeled to 'independent' groups were used on behalf of Republican candidates during the weeks leading up to the November 1996 election. Americans for Tax Reform—the largest recipient of RNC funds—received $4.6 million, as noted above. ATR used this money to conduct a massive 'issue advocacy' campaign aimed at helping the Republicans.... By operating through surrogates like ATR, the RNC was able to circumvent federal campaign finance laws. When a political party broadcasts issue ads, it is required to pay for them with a combination of hard dollars and soft dollars. If an outside group runs such ads, there are no such restrictions—even if the funding comes from the RNC. Thus, the RNC was able to use 100 percent soft money to pay for ads by outside groups. By channeling money to outside groups and having them run issue ads, the RNC was able to conserve precious hard dollars and circumvent federal restrictions on how soft money can be spent." Thomp. Rep. at 5978-79 (minority views).

"Several Republican donors contributed money to nonprofit organizations that ran purported 'issue ads' aimed at helping specific Republican candidates win election in 1996. These nonprofits were typically put forth as 'grassroots' organizations but several were, in fact, established for the main—or sole—purpose of running political ads under the guise of issue advocacy.... Triad managed two tax-exempt organizations[:] Citizens for Reform and Citizens for the Republic Education Fund.... [B]oth entities were shell companies with no offices, no employees, and no members. They were established in the spring of 1996 for the sole purpose of running attack ads—under the guise of 'issue advocacy'—to help

Republican candidates win election to Congress. . . . In fact, there is overwhelming evidence that these so-called 'issue ads' were but one tool in a carefully orchestrated campaign to spend money on behalf of specific Republican candidates without adhering to federal election laws." Thomp. Rep. at 5981-82 (minority views).

"The issue advocacy loophole was also exploited by Triad Management Services, a for-profit company that claims to be in the business of providing advice to conservative donors in exchange for fees. In fact, Triad was funded by a handful of wealthy Republican donors who used it as a mechanism to support the election of conservative Republican candidates . . . . Triad channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' . . . By operating this way, Triad and its financial backers avoided the disclosure and campaign contribution limits of the federal election laws." Thomp. Comm. Rep. at 4569 (minority views).

Congressional Testimony

"In the [1996] election cycle, so-called issue advocacy became one of the most prominent and controversial weapons in the federal campaigns. It provided an easy way for individuals, political committees, corporations, and unions to spend money to influence elections without any regulatory control. Its impact cannot be exaggerated. To anyone interested in campaign finance reform, issue advocacy is the 800-pound gorilla. Without taming it, campaign finance reform, no matter how thoroughly it addresses public funding, soft money, PAC spending, or any other perceived problems, will come to naught. Issue advocacy represents a huge, gaping loophole of last resort." Thomp. Comm. Rep. at 7521 (minority views) (hearing testimony of Prof. Daniel Ortiz).

"The second loophole that destroys the effectiveness of current campaign finance rules allows individuals and groups to participate vigorously in elections debate, while pretending

to be interested only in educating the electorate on a particular issue. . . . Unless the sham 'issue advocacy' loophole is firmly closed, wealthy contributors who cannot give money directly to a candidate, because they are corporations or unions or individuals who have hit a maximum, will simply recycle the funds as sham 'issue advocacy' carefully orchestrated to help a candidate, but skirting regulation." *The Constitution and Campaign Reform: Hearings before the Comm. on Rules and Admin.* 106th Cong. 28, 2d Sess. (2000) (statement of Deborah Goldberg, Deputy Director, Democracy Program, Brennan Center for Justice at NYU School of Law).

"This matter raises a question of fundamental importance to the continued viability of the Federal Election Campaign Act (FECA), as well as to the broader goal of regulating money in the political process: whether the Congress will permit the creation of a loophole in the FECA through which unlimited, unregulated and undisclosed money can flow into federal campaigns, thereby subverting the FECA's purpose of protecting the integrity of the electoral process from corruption and the appearance of corruption—interests which the Supreme Court found to serve compelling public purposes in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). . . . The mechanism of this subversion is electioneering for candidates that takes place in the form of so-called 'issue advocacy.'" *The First Amendment and Restrictions on Issue Advocacy: Hearings Before the House Subcomm. on the Constitution*, 105th Cong. 140-41, 2d Sess. (1998) (statement of Donald J. Simon, Executive Vice President and General Counsel, Common Cause).

"These are not speculative or hypothetical fears—such evasion occurred in the 1996 elections, involving tens of millions of dollars spent outside the scope of the FECA, simply because the ads were carefully crafted to avoid the use of 'magic words.' . . . Bluntly speaking, this spending [by parties and outside groups] represented a means of massive cheating on the federal campaign finance laws." *The First Amendment and Restrictions on Issue Advocacy: Hearings*

Before the House Subcomm. on the Constitution 105th Cong. 143, 2d Sess. (1998) (statement of Donald J. Simon, Executive Vice President and General Counsel, Common Cause).

APPENDIX D

TITLE 2. THE CONGRESS

CHAPTER 14. FEDERAL ELECTION CAMPAIGNS

Selected BCRA Amendments

Material added by BCRA in bold

§ 431. Definitions

* * * *

(20) Federal election activity.

(A) In general. The term "Federal election activity" means—

(i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;

(ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot);

(iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate); or

(iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(B) Excluded activity. The term "Federal election activity" does not include an amount expended or disbursed by a State, district, or local committee of a political party for—

(i) a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii);

(ii) a contribution to a candidate for State or local office, provided the contribution is not designated to pay for a Federal election activity described in subparagraph (A);

(iii) the costs of a State, district, or local political convention; and

(iv) the costs of grassroots campaign materials, including buttons, bumper stickers, and yard signs, that name or depict only a candidate for State or local office.

* * * *

§ 434. Reporting requirements

* * * *

(e) Political committees

(1) National and congressional political committees

The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate committee of either, shall report all receipts and disbursements during the reporting period.

(2) Other political committees to which section 323 applies

(A) In general

In addition to any other reporting requirements applicable under this Act, a political committee (not described in paragraph (1)) to which section 441i(b)(1) of this title applies shall report all receipts and disbursements made for activities described in section 431(20)(A) of this title, unless the aggregate amount of such receipts and disbursements during the calendar year is less than $5,000.

(B) Specific disclosure by State and local parties of certain non-Federal amounts permitted to be spent on Federal election activity

Each report by a political committee under subparagraph (A) of receipts and disbursements made for activities described in section 431(20)(A) of this title shall include a disclosure of all receipts and disbursements described in section 441i(b)(2)(A) and (B) of this title.

(3) Itemization

If a political committee has receipts or disbursements to which this subsection applies from or to any person aggregating in excess of $200 for any calendar year, the political committee shall separately itemize its reporting for such person in the same manner as required in paragraphs (3)(A), (5), and (6) of subsection (b) of this section.

(4) Reporting periods

Reports required to be filed under this subsection shall be filed for the same time periods required for political committees under subsection (a)(4)(B) of this section.

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication

For purposes of this subsection—

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which–

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect

the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Internal Revenue Code

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986.

(g) Time for reporting certain expenditures

(1) Expenditures aggregating $1,000

(A) Initial report

A person (including a political committee) that makes or contracts to make independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before the date of an election shall file a report describing the expenditures within 24 hours.

(B) Additional reports

After a person files a report under subparagraph (A), the person shall file an additional report within 24 hours after each time the person makes or contracts to make independent expenditures aggregating an additional

$1,000 with respect to the same election as that to which the initial report relates.

(2) Expenditures aggregating $10,000

(A) Initial report

A person (including a political committee) that makes or contracts to make independent expenditures aggregating $10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.

(B) Additional reports

After a person files a report under subparagraph (A), the person shall file an additional report within 48 hours after each time the person makes or contracts to make independent expenditures aggregating an additional $10,000 with respect to the same election as that to which the initial report relates.

(3) Place of filing; contents

A report under this subsection—

(A) shall be filed with the Commission; and

(B) shall contain the information required by subsection (b)(6)(B)(iii) of this section, including the name of each candidate whom an expenditure is intended to support or oppose.

(4) Time of filing for expenditures aggregating $1,000

Notwithstanding subsection (a)(5) of this section, the time at which the statement under paragraph (1) is received by the Commission or any other recipient to whom the notification is required to be sent shall be considered the time of filing of the statement with the recipient.

* * * *

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions.

~~(1) No~~**(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no** person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed ~~$ 1,000~~ **2,000**;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed ~~$ 20,000~~ **25,000**;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

~~(C) to any other political committee in any calendar year which, in the aggregate, exceed $ 5,000.~~

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $ 5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $ 15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $ 5,000.

~~(3) No individual shall~~**(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may** make contributions aggregating more than ~~$ 25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the~~

~~calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.~~ —

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

* * * *

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B) (i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

——~~(ii)~~**(iii)** the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign

committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 434(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

——~~(C)~~ **(D)** contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

* * * *

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office.

* * * *

(4) Independent versus coordinated expenditures by party

(A) In general

On or after the date on which a political party nominates a candidate, no committee of the political party may make—

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at

any time after it makes any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with respect to the candidate during the election cycle.

(B) Application

For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) Transfers

A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

* * * *

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section ~~12(h) of the Public Utility Holding Company Act (15 U.S.C. 79*l*(h)),~~ **79l(h) of Title 15,** the term "contribution or expenditure" ~~shall include~~ **includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes** any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business)

to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section **or for any applicable electioneering communication**, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

* * * *

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by individuals" does not include funds the source

of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) of this section if an entity described in subsection (a) of this section directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) of this section shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 434(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection—

(A) the term "section 501(c)(4) organization" means—

(i) an organization described in section 501(c)(4) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with Internal Revenue Code

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of Title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 434(f)(3)(C) of this title.

§ 441i. ~~[Repealed]~~ Soft money of political parties

(a) National committees

(1) In general

A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

The prohibition established by paragraph (1) applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee.

(b) State, district, and local committees

(1) In general

Except as provided in paragraph (2), an amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party (including an entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee of a political party and an officer or agent acting on behalf of such committee or entity), or by an association or similar group of candidates for State or local office or of individuals holding State or local office, shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Applicability

(A) In general

Notwithstanding clause (i) or (ii) of section 431(20)(A) of this title, and subject to subparagraph (B), paragraph (1) shall not apply to any amount expended or disbursed by a State, district, or local committee of a political party for an activity described in either such clause to the extent the amounts expended or disbursed for such

activity are allocated (under regulations prescribed by the Commission) among amounts—

(i) which consist solely of contributions subject to the limitations, prohibitions, and reporting requirements of this Act (other than amounts described in subparagraph (B)(iii)); and

(ii) other amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection).

(B) Conditions

Subparagraph (A) shall only apply if—

(i) the activity does not refer to a clearly identified candidate for Federal office;

(ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;

(iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than $10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and

(iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—

(I) any other State, local, or district committee of any State party,

(II) the national committee of a political party (including a national congressional campaign committee of a political party),

(III) any officer or agent acting on behalf of any committee described in subclause (I) or (II), or

(IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II).

(C) Prohibiting involvement of National parties, Federal candidates and officeholders, and State parties acting jointly

Notwithstanding subsection (e) of this section (other than subsection (e)(3) of this section), amounts specifically authorized to be spent under subparagraph (B)(iii) meet the requirements of this subparagraph only if the amounts–

(i) are not solicited, received, directed, transferred, or spent by or in the name of any person described in subsection (a) or (e) of this section; and

(ii) are not solicited, received, or directed through fundraising activities conducted jointly by 2 or more State, local, or district committees of any political party or their agents, or by a State, local, or district committee of a political party on behalf of the State, local, or district committee of a political party or its agent in one or more other States.

(c) Fundraising costs

An amount spent by a person described in subsection (a) or (b) of this section to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act.

(d) Tax-exempt organizations

A national, State, district, or local committee of a political party (including a national congressional campaign committee of a political party), an entity that is directly or indirectly established, financed, maintained, or controlled by any such national, State, district, or local committee or its agent, and an officer or agent acting on behalf of any such party committee or entity, shall not solicit any funds for, or make or direct any donations to—

(1) an organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a)

of such title (or has submitted an application for determination of tax exempt status under such section) and that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity); or

(2) an organization described in section 527 of such title (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(e) Federal candidates

(1) In general

A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act; or

(B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—

(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under paragraphs (1), (2), and (3) of section 441a(a) of this title; and

(ii) are not from sources prohibited by this Act from making contributions in connection with an election for Federal office.

(2) State law

Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph who is or was also a candidate for a State or local office solely in connection with such election for

State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

(3) Fundraising events

Notwithstanding paragraph (1) or subsection (b)(2)(C) of this section, a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.

(4) Permitting certain solicitations

(A) General solicitations

Notwithstanding any other provision of this subsection, an individual described in paragraph (1) may make a general solicitation of funds on behalf of any organization that is described in section 501(c) of Title 26 and exempt from taxation under section 501(a) of such title (or has submitted an application for determination of tax exempt status under such section) (other than an entity whose principal purpose is to conduct activities described in clauses (i) and (ii) of section 431(20)(A) of this title) where such solicitation does not specify how the funds will or should be spent.

(B) Certain specific solicitations

In addition to the general solicitations permitted under subparagraph (A), an individual described in paragraph (1) may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 431(20)(A) of this title, or for an entity whose principal purpose is to conduct such activities, if—

(i) the solicitation is made only to individuals; and

(ii) the amount solicited from any individual during any calendar year does not exceed $20,000.

(f) State candidates

(1) In general

A candidate for State or local office, individual holding State or local office, or an agent of such a candidate or individual may not spend any funds for a communication described in section 431(20)(A)(iii) of this title unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

(2) Exception for certain communications

Paragraph (1) shall not apply to an individual described in such paragraph if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.

APPENDIX E

Table 2.
National Political Party Spending, 1976-2000 ($ Millions)

Election	Democrats			Republicans			Overall Spending			
	Federal (Hard)	Nonfederal (Soft)	Total	Federal (Hard)	Nonfederal (Soft)	Total	Federal (Hard)	Nonfederal (Soft) $	Nonfederal (Soft) %	Total
1976	19.4	--	19.4	40.1	--	40.1	59.5	--	0	59.5
1980	35.0	4.0	39.0	161.8	15.1	176.9	196.8	19.1	8	215.9
1984	97.4	6.0	103.4	300.8	15.6	316.4	398.2	21.6	5	419.8
1988	121.9	23.0	144.9	257.0	22.0	279.0	378.9	45.0	11	423.9
1992	171.9	32.9	204.8	256.1	47.5	303.6	428.0	80.4	16	508.4
1994	137.8	50.4	188.2	234.7	48.4	283.1	372.5	98.8	21	471.3
1996	214.3	121.8	336.1	408.5	149.7	558.2	622.8	271.5	30	894.3
1998	155.3	93.0	248.3	275.9	127.7	403.6	431.2	220.7	34	651.9
2000	265.8	244.9	510.7	427.0	252.8	679.8	692.8	497.7	42	1190.5

Sources: Anthony Corrado. *Campaign Finance Reform*. New York: Century Foundation Press, 2000, p. 70; Federal Election Commission, "FEC Reports Increase in Party Fundraising for 2000," May 15, 2001. Figures for 1976 and for nonfederal spending between 1980 and 1988 are estimates. All other figures are provided by the Federal Election Commission.

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% from Affiliated Individuals

Total to Reps($)

% to Reps

Total to Dems($)

Total ($)

% to Dems

% from Treasury

Organization

Table 5.
Top 50 Soft Money Donors in 1996

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
New York Republican State Committee	3,287,175	0	3,287,175	0	100	100	0
Philip Morris	3,019,414	496,518	2,522,896	16	84	100	0
Joseph E Seagram & Sons	2,050,583	1,373,438	677,145	67	33	50	50
RJR Nabisco	1,442,931	254,756	1,188,175	18	82	100	0
California Republican Party	1,350,000	0	1,350,000	0	100	100	0
Walt Disney Co	1,347,000	1,043,050	303,950	77	23	99	1
Atlantic Richfield	1,262,031	486,372	775,659	39	61	100	0
Federal Express Corp	1,157,044	592,625	564,419	51	49	98	2
Communications Workers of America	1,150,300	1,150,300	0	100	0	100	0
MCI Telecommunications	1,005,963	646,600	359,363	64	36	99	1
AT&T	1,000,024	447,184	552,840	45	55	99	1
American Federation of St/Cnty/Munic Employees	958,462	958,462	0	100	0	100	0
Republican Party of Florida	934,746	0	934,746	0	100	100	0
News Corp	869,700	75,000	794,700	9	91	69	31
Association of Trial Lawyers of America	803,400	606,300	197,100	75	25	100	0
MacAndrews & Forbes	779,649	639,649	140,000	82	18	94	6
Anheuser-Busch	773,057	401,107	371,950	52	48	100	0
Time Warner	761,250	365,250	396,000	48	52	83	17
Lazard Freres & Co	759,956	595,106	164,850	78	22	0	100
Eli Lilly & Co	746,835	239,850	506,985	32	68	100	0
United Food & Commercial Workers Union	733,771	733,771	0	100	0	100	0
American Airlines	711,450	398,349	313,101	56	44	100	0
Chevron Corp	708,184	176,050	532,134	25	75	100	0
DreamWorks SKG	702,400	702,400	0	100	0	0	100
Archer-Daniels-Midland Co	701,000	295,000	406,000	42	58	91	9
Michigan Republican State Committee	699,133	0	699,133	0	100	100	0
Enron Corp	687,445	142,400	545,045	21	79	59	41
Goldman Sachs	666,075	472,500	193,575	71	29	5	95
Textron Inc	654,227	274,700	379,527	42	58	100	0
NYNEX Corp	652,802	240,347	412,455	37	63	100	0
American Financial Group	645,250	115,000	530,250	18	82	77	23
Brown & Williamson Tobacco	642,500	7,500	635,000	1	99	100	0
Laborers Union	634,588	627,088	7,500	99	1	100	0
Loral Space & Communications	632,500	601,500	31,000	95	5	0	100
Integrated Health Services	609,270	574,000	35,270	94	6	83	17
Northwest Airlines	608,900	352,400	256,500	58	42	70	30
American Defense Institute	600,000	0	600,000	0	100	100	0
UST Inc	595,592	68,862	526,730	12	88	97	3
Entergy Corp	592,371	295,000	297,371	50	50	98	2

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Organization

Organization	Total ($)	Total to Dems ($)	Total to Reps ($)	% to Dems	% to Reps	% from Treasury	% from Affiliated Individuals
Sprint Corp	585,732	409,609	176,123	70	30	100	0
Blue Cross/Blue Shield	578,793	139,635	439,158	24	76	99	1
PaineWebber	567,366	155,700	411,666	27	73	93	7
Freddie Mac	558,250	287,500	270,750	52	48	100	0
WMX Technologies	556,500	187,200	369,300	34	66	100	0
BankAmerica	554,329	192,939	361,390	35	65	100	0
Bristol-Myers Squibb	552,400	114,500	437,900	21	79	88	12
Tobacco Institute	537,357	106,044	431,313	20	80	100	0
Travelers Group	535,410	200,349	335,061	37	63	80	20
Service Employees International Union	532,880	531,630	1,250	100	0	100	0
Milberg, Weiss et al	530,000	530,000	0	100	0	28	72

Source: Based on an analysis provided by the Center for Responsive Politics on September 19, 2002. "Totals" include funds donated from organization treasuries and funds given by individuals affiliated with the organization.

same info in these black boxes as on page 52a AMB

Table 6.
Top 50 Soft Money Donors In 2000

Organization	Total $	Soft $	PAC $	Dem %	Rep %	Soft %	Soft % (Indiv)
American Fedn of St/Cnty/Munic Employees	5,949,000	5,949,000	0	100	0	100	0
AT&T	4,398,920	1,776,269	2,622,651	40	60	95	5
Service Employees International Union	4,288,096	4,257,696	30,400	99	1	100	0
Carpenters & Joiners Union	2,873,500	2,873,500	0	100	0	100	0
Freddie Mac	2,398,250	1,025,000	1,373,250	43	57	100	0
Philip Morris	2,383,453	296,641	2,086,812	12	88	100	0
Communications Workers of America	2,355,000	2,355,000	0	100	0	100	0
Microsoft Corp	2,317,226	966,792	1,318,384	43	57	75	25
United Food & Commercial Workers Union	2,146,450	2,146,450	0	100	0	100	0
Global Crossing	2,083,195	1,161,652	921,543	56	44	40	60
SBC Communications	1,862,228	876,621	985,607	47	53	100	0
Intl Brotherhood of Electrical Workers	1,780,000	1,780,000	0	100	0	100	0
Bristol-Myers Squibb	1,740,951	213,250	1,527,701	12	88	85	15
Enron Corp	1,671,555	532,565	1,138,990	32	68	70	30
American Federation of Teachers	1,668,000	1,668,000	0	100	0	100	0
MGM Mirage	1,563,086	713,086	850,000	46	54	100	0
Pfizer Inc	1,558,817	160,000	1,398,817	10	90	99	1
Citigroup Inc	1,509,010	763,806	745,204	51	49	86	14
Saban Entertainment	1,496,000	1,496,000	0	100	0	21	79
National Rifle Association	1,489,222	0	1,489,222	0	100	100	0
Verizon Communications	1,473,451	573,800	899,651	39	61	99	1
Williams & Bailey	1,365,000	1,365,000	0	100	0	42	58
FedEx Corp	1,327,600	475,478	852,122	36	64	100	0
Loral Spacecom	1,291,800	1,291,250	550	100	0	0	100
American Financial Group	1,280,000	620,000	660,000	48	52	12	88
Sheet Metal Workers Union	1,255,854	1,255,854	0	100	0	100	0
Buttenwieser & Associates	1,252,500	1,252,500	0	100	0	0	100
MBNA Corp	1,235,905	200,000	1,035,905	16	84	60	40
Ness, Motley et al	1,230,500	1,230,500	0	100	0	100	0
Vyyo Inc	1,207,500	1,207,500	0	100	0	0	100
Angelos Law Offices/Baltimore Orioles	1,197,900	1,172,900	25,000	98	2	22	78
Fannie Mae	1,188,650	610,800	577,850	51	49	96	4
Credit Suisse First Boston	1,185,450	443,000	742,450	37	63	36	64
Vivendi Universal	1,172,238	640,219	532,019	55	45	60	40
Lockheed Martin	1,152,350	457,500	694,850	40	60	100	0
Amway/Alticor Inc	1,138,500	0	1,138,500	0	100	32	68
Goldman Sachs	1,133,350	757,250	376,100	67	33	5	95
Slim-Fast Foods/Thompson Medical	1,113,000	1,093,000	20,000	98	2	2	98

Same info in these black boxes as on page 52a AMB

Organization	Total $	Soft $	PAC $	Dem %	Rep %	Soft %	Soft % (Indiv)
Blue Cross/Blue Shield	1,104,415	236,250	868,165	21	79	100	0
Limited Inc	1,080,100	300,000	780,100	28	72	88	12
United Parcel Service	1,072,871	195,662	877,209	18	82	100	0
America Online	1,061,205	452,750	608,455	43	57	35	65
Milstein Properties	1,044,515	1,044,515	0	100	0	0	100
UST Inc	1,041,570	53,000	988,570	5	95	99	1
American International Group	1,036,760	554,010	482,750	53	47	100	0
Association of Trial Lawyers of America	980,200	974,850	5,350	99	1	100	0
Anheuser-Busch	968,281	413,256	555,025	43	57	100	0
Metabolife	963,000	558,000	405,000	58	42	100	0
AFLAC Inc	961,325	453,000	508,325	47	53	100	0
GlaxoSmithKline	955,695	80,900	874,795	8	92	99	1

Source: Based on an analysis provided by the Center for Responsive Politics on September 19, 2002. "Totals" include funds donated from organization treasuries and funds given by individuals affiliated with the organization.